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Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Reference: Independent contracting and labour hire arrangements

THURSDAY, 31 MARCH 2005

SYDNEY

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

Thursday, 31 March 2005

Members: Mr Barresi *(Chair)*, Mr Brendan O'Connor *(Deputy Chair)*, Mr Baker, Mr Burke, Ms Annette Ellis, Ms Hall, Mr Henry, Mrs May, Mr Randall and Mr Vasta

Members in attendance: Mr Baker, Mr Barresi, Ms Hall, Mr Henry, Mr Brendan O'Connor and Mr Vasta

Terms of reference for the inquiry:

To inquire into and report on:

the status and range of independent contracting and labour hire arrangements;

ways independent contracting can be pursued consistently across state and federal jurisdictions;

the role of labour hire arrangements in the modern Australian economy; and

strategies to ensure independent contract arrangements are legitimate.

WITNESSES

Committee met at 9.04 a.m.

HART, Mr John, Chief Executive Officer, Restaurant and Catering Industry Association of Australia

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation inquiry into independent contractors and labour hire arrangements. The inquiry arises from a request to this committee by the Minister for Employment and Workplace Relations. We have received over 60 submissions so far. This is our second day of hearings. I welcome Mr John Hart, from the Restaurant and Catering Industry Association of Australia. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and they warrant the same respect as proceedings of the House itself. I remind you also that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We would prefer to hear evidence in public, but should you have issues to raise that you would like us to hear in private then let us know and we will consider your request. We have received your submission. It is a good submission with some good graphs and stats on your industry. It presents some very good light reading, and some heavy reading. Would you like to make any introductory comments or talk to your submission?

Mr Hart—I will make a couple of introductory comments. My organisation is a federally structured organisation. The views that we have put in our submission and the views that I will express today are those that our member state associations agree on. We have a fairly rigorous process for getting to those points that we agree on. I will limit my comments to those matters. Through those state associations, we have around 6,000 members which are restaurant and catering organisations across the country. Those organisations account for approximately 50 per cent of the employing businesses in that sector. So we have a very good representation across the board. Through appearances, such as here today, and the making of submissions, our organisation aims to provide industry intelligence and give an opportunity for us to put the view of a very significant employing sector within industry. We put those views so that the needs of our industry can be taken account of.

As we state in the submission though, we do not seek to provide technical advice on how legislation might be framed to overcome any of the challenges that our industry faces. We do not view that as our role; our role is to provide industry intelligence and an update on where and how our industry might be affected by the changes proposed and by any move to protect independent contracting and labour hire arrangements. I want to provide a very quick summary of the information contained in our submission. There are about 30,000 restaurant businesses in Australia and 94 per cent of those have a turnover of under $500,000 a year. So they are very small businesses. Last year we turned over about $11.8 billion. So it is an industry which is turning over a huge amount of money. The growth in that turnover is about six per cent per annum. So it is a high-growth sector in turnover terms but in terms of profitability we do not fair so well with about 1.5 per cent net profit on turnover.

One-third of our businesses are still sole traders or partnerships, not incorporated entities. That has some implications in terms of the matters before this inquiry. We employ about 240,000 people and 53 per cent of those people are casual workers. That proportion has been increasing year on year for the last six years. We are a very labour-intensive sector. We have a lower

proportion of working operators than most other industries, and that is because we are a labour-intensive business. Unfortunately, that is one of the hallmarks of providing the service that we provide: it requires people. We are the third fastest growing industry—

Mr BRENDAN O'CONNOR—Unfortunately?

Mr Hart—Unfortunately, yes; that provides us with challenges. We are the third fastest growing industry projected through to 2011, with a need for 12,700 employees per annum between now and 2011. So we have a huge thirst for labour. In terms of labour hire arrangements, essentially in our industry at the moment labour hire is not a large feature of the way we do business—about 17.5 per cent estimated through a Victorian report. We see an inverse relationship between the casualisation of industry and labour hire arrangements as might be evident in our part of the world—although we see into the future that the thirst for labour will have to be met by all sorts of initiatives, including an expanse of labour hire. Those are the core propositions in the submission.

CHAIR—Thank you. That was a good submission. You introduced some ideas and some issues which I had not come up against until now. Are there any particular labour hire companies that specialise in restaurant catering?

Mr Hart—There are.

CHAIR—Who are they?

Mr Hart—One that is prominent is Chefs on the Run. They have been around for quite some years and particularly service the kitchen side of the business, which is where we have the greatest skill shortage.

CHAIR—I guess you are saying that the skill shortage is hitting your industry far more than some other areas and that that, combined with the seasonality of your work, is changing the pattern of employment arrangements from full-time to casual and then the next step to labour hire. You mention in your submission that some enterprises are looking forward to profit distribution contracting arrangements to entice workers. That would surely have to be only with full-time employees.

Mr Hart—In the main, yes.

Mr BRENDAN O'CONNOR—Large hotels.

Mr Hart—Large hotels are certainly doing that sort of thing. Elsewhere around the world we see this happening quite a lot, particularly in food service enterprises in the US, for example, where the operator of a restaurant—and this is more to the question of independent contractors than labour hire arrangements—independently contracts operators for individual kitchens within a business. For example, in a quick service restaurant environment the restaurant operator might bring in single operators in a lot of cases to operate individual kitchens within that business, engaging them on a contractual basis, and they profit share in the whole quick service restaurant business.

CHAIR—So that operator would be in charge of all the staff for the kitchen.

Mr Hart—That is right—for that particular kitchen within that complex.

CHAIR—What about front-end staff? Would you see that happening as well?

Mr Hart—That also happens elsewhere around the world. Currently, the skill shortage is probably not biting as hard in front of house, so we are not seeing the tension at this point in front of house. But there are certainly examples elsewhere around the world where that sort of contracting arrangement works in front of house as well. It is slightly more difficult to see how that might apply in Australia at this point, but certainly in the kitchen the examples are well known.

Mr BRENDAN O'CONNOR—Is it likely that the chef in a restaurant would be casual?

Mr Hart—Kitchen staff are far less likely to be casual than front of house staff.

Mr BRENDAN O'CONNOR—I have noticed, as I am sure other committee members have, that there is some link between the security of employment of a given employee or set of employees and the skills they acquire, because if they are likely to stay around the employer will invest time and the like in them. So kitchen staff are more likely to be permanent.

Mr Hart—Correct.

Mr BRENDAN O'CONNOR—But, as you say, your industry would effectively be the most casualised in Australia. Isn't it double the average—53 per cent?

Mr Hart—It is.

Mr BRENDAN O'CONNOR—Is that one of the reasons why there is a lesser take-up rate for employees under labour hire? I know casualisation has increased in the industry, but really in certain parts of that industry it has been casual forever.

Mr Hart—Yes, and I think the point is well made that there is this inverse relationship between casualisation and labour hire arrangements. I guess that is because in the areas that are able and are used to using casual labour—essentially because they have to, because of seasonality and other factors—the labour hire arrangement is not as necessary in those environments.

Mr BRENDAN O'CONNOR—As I understand it—I am not sure if this is the case, and please let us know whether it is—labour hire employees are more likely to go into areas where there are permanent employees, but in an establishment where, say, 75 per cent of its work force is casual, as in restaurants, there is less likelihood of a demand for labour hire employees. Is that correct or am I just assuming?

Mr Hart—I think that is correct, but I think as the labour market changes and as the industry landscape changes that might also change. At the moment we have this very seasonal pattern of business and we also have a very significant pattern of business across the week—that is,

everyone's Saturday nights are hugely busy, city based businesses are particularly busy on Friday nights and Sunday lunches are pretty good, but a whole lot of other times during the week are not. If everyone's peaks are the same, you have to use casual labour. You do not have any opportunity to share labour.

Mr BRENDAN O'CONNOR—Yes, because of fluctuations.

Mr Hart—If you have a situation where there is less consistency to those peaks and troughs, I think labour hire will become more of a feature because labour hire firms are going to be able to place staff across businesses that have different peaks, employing them on a full-time basis in a labour hire type arrangement and then hiring them out to other businesses to fill those peaks and troughs.

Mr BRENDAN O'CONNOR—Would that be more or less likely in a large establishment?

Mr Hart—It certainly is easier to have different peaks and troughs in different outlets in a larger establishment. But it is unlikely in a restaurant environment.

Mr BRENDAN O'CONNOR—What about a family business: would they be more likely to employ a labour hire employee than, say, a chain of hotels?

Mr Hart—They would be less likely.

CHAIR—You mentioned in your submission multiple workplaces and individuals seeking full-time engagement by going to multiple workplaces. Certainly, we have seen evidence of that in other industries where a portfolio of jobs makes up a full-time job. Looking at jobs where there is a skills shortage, such as in the kitchen, the individual has a power to negotiate across multiple workplaces. Are we seeing evidence of situations where chefs are subcontracting to a number of outlets and, in doing so, being in the position of prime bargaining agents rather than the other way around, as we often hear?

Mr Hart—We are certainly seeing situations where chefs are subcontracting out to multiple operations. One example that comes to mind is in Adelaide, where a chef who is an owner of a business is also subcontracting his services to at least five other businesses for the creation of menus, the design of kitchens and the operations of those kitchens.

CHAIR—So it is more of a consultancy arrangement rather than hands on.

Mr Hart—But fulfilling both roles. For instance, this individual goes into a kitchen, sets it up and works in that kitchen for maybe half a night a week to make sure that the standards are being reproduced and then moves onto the next business.

Mr VASTA—An executive chef.

Mr Hart—An executive chef type role that, generally, restaurants cannot afford to engage and that operates across a number of businesses.

Mr BAKER—On the same night?

Mr Hart—No.

Mr BAKER—That is what confuses me a little bit: you only have lunch at lunchtime and dinner at dinnertime. So when you say they are moving from business to business—

Mr Hart—They might do a Tuesday night in one business. They work with the team in the kitchen on that Tuesday night, make sure that all the dishes are coming out the right way, design some procedures and then move on to the next business the next night. They then work the same thing with a different kitchen team and then move on to the next business. They work different shifts in different businesses.

CHAIR—The enterpriser might not be able to afford him full time; they might only be able to afford him for a couple of days. Let me look at it from the other point of view: the view of the restaurant owner. If you have a chef in that situation, is it possible for a number of operators to get together and create an agreement with that one individual?

Mr Hart—I suggest that the competitive nature of the industry could be such that they would not want to share the intellectual property that might be required to come up with that agreement between themselves. They are inherently averse to sharing some of the information on their businesses.

CHAIR—Unless it is an owner who has multiple sites.

Mr Hart—That is right—or if it is driven the other way: that is, the individual operating across those businesses goes out and hawks their services to a number of different enterprises.

Mr HENRY—In your submission you talk about the changing nature of employment. You then go on to make connections with skills shortages, the role of group training and incidences of labour hire relationships. Are increasing incidences of labour hiring impacting on the amount of training that is done by industry? Is group training filling the gaps? Is there a difference between the number of people directly training now and what group training does? How is that impacting in terms of skills shortages?

Mr Hart—That is a great question. Group training is an environment that is using a labour hire type model. Our industry is a very big user of group training services. As group training grows as a concept and apprentices and trainees are being engaged through group training companies and then hired out to businesses, those group training companies are becoming the most effective way to ensure that we get a commitment to training. There is a much greater commitment to training for apprentices and trainees that are engaged through group training companies, so they are a very effective way of doing that. I think also, as we see down the track a growth in labour hire, simply the collection of a number of employees through a third party business will give rise to greater training. In the example that I used, Chefs on the Run invests in training the people that are working with them or working for them.

Mr HENRY—So they are actually directly training as well as being a labour hire organisation?

Mr Hart—Exactly, yes. And they are conducting professional development for those that are working for them, which of course enhances skills across the board. So, yes, there is a coincident relationship between training and labour hire.

Mr HENRY—Do you see the skill shortage eventually being taken up without impacting on industry growth?

Mr Hart—I cannot see the skill shortage being taken up any time in the near future irrespective of changes to labour hire or any other series of changes we would like to propose. It is simply too deep. We have had a skill shortage in the kitchen since 1956. It is unlikely that we are going to see that recover in the short term. But anything that we can do or any initiative that helps us start to claw back a 2,000-person shortage in cookery has got to be a good thing.

Mr BAKER—From what you have said just now and also in your submission, there seems to be a lot of flexibility in employment arrangements. Moving forward, what additional things could be put in place that could be an advantage to your industry?

Mr Hart—As you suggested, there is a good amount of flexibility there now, particularly through engaging people through casual arrangements and so on. I think the changes need to focus—and we have alluded to this in the submission—on making sure that any of those flexible arrangements are galvanised in certainty. We need to know that those arrangements provide absolute certainty to our employers, to our members. If we have labour hire arrangements that do not provide certainty, if we have casual arrangements that do not provide certainty, if businesses cannot be assured that they have met all their obligations each and every day then we are going to have a problem expanding any of those industries.

CHAIR—Expand on that. What obligations are you referring to?

Mr Hart—So they are clear on their obligations for workers compensation, payment of superannuation and payment of whatever wages they are paying in and of themselves.

CHAIR—Why would this be any different to any other organisation that is currently using labour hire organisations?

Mr Hart—I do not know that it is any different to any other organisation. From our perspective the key tenet has to be that the employer knows and is in no way exposed to any future risk of claim for additional payments or claim for any other obligation.

CHAIR—But there is one area, while we are on this, which would affect your industry as much as others—or perhaps even more so—and that is the area of occupational health and safety. We have discussed with other witnesses the idea of shared responsibility and that when you employ a labour hire company you do not absolve yourself of the responsibility for a safe workplace. So that restaurant owner cannot simply say, 'It's a sloppy kitchen, an untidy kitchen. There's grease on the floor, or whatever. That's not my problem; that's the labour hire company's problem.' They are still liable for it. Are they willing to accept that?

Mr Hart—Absolutely, as they do today.

CHAIR—Good operators would, yes.

Mr Hart—We have a relatively low incidence of accidents and illnesses in the workplace in our industry.

Mr VASTA—But that is policed by something else. That is policed by, say, the Brisbane City Council, that make regular inspections of that.

CHAIR—Yes, the health act would come into play there.

Mr BRENDAN O'CONNOR—The way I look at your industry is that you have got restaurants which are family businesses—and who knows how informal their employment relationships are but that is fine—and you have got restaurants with a large body of transient workers, such as waiters, going through, but in many major hotels they invest a lot more in their staff and many of them are permanent staff. Customers' expectations of the service of the hospitality industry are generally greater today than they were 20 years ago. Why is it that the hotels are more likely to make their staff permanent, invest in training and create a corporate culture in that chain of hotels, but large restaurants, not so much the family business ones, do not do that—you do see it?

Mr Hart—I would like to challenge that you do not see it, because you do see it. You may see it to a lesser extent, but I believe it is there—particularly in the good businesses.

Mr BRENDAN O'CONNOR—I would like you to flesh that out then, if that is the case.

Mr Hart—There are two factors. The first is the size of the work force and the second is the seasonality or the unreliability of the business. Firstly, we can go to the size of the work force. One of the graphs that we had in the submission showed the vastly different break-up of business size in the hotel, club and restaurant markets. Our businesses are so much smaller than the average hotel business so that in a smaller work force there is less opportunity for downtime, there is less opportunity for groups of people with similar skills to be working on those skills in training environments, there is less capacity to engage trainees and apprentices—albeit, over 70 per cent of our businesses have engaged a trainee or an apprentice over the last three years. So there is less capacity in a smaller work force to make that investment.

Secondly, there is the aspect of seasonality. A hotel has a captive audience. It has 200 or 300 people staying in a set of rooms atop restaurants and bars, and those people will service those outlets irrespective of whether it is a Wednesday night, Thursday night or Saturday night. Restaurant businesses, whether they are a small or a large business, are inherently at the mercy of us as consumers and when we decide to eat out. Unfortunately, we all decide that Friday and Saturday nights are the nights that we like to go out and eat. Those peaks in business are much more prevalent in the restaurant environment than they are in the hotel environment.

Mr BRENDAN O'CONNOR—Can you expand on the restaurants that do invest in their staff. You said there was a group that does that.

Mr Hart—We do a number of things in this training and education area to highlight those businesses that do, which are perhaps at the larger end of the scale. In fact, our members have a

higher average employment level than the main so our members are more likely to fit into this category. They are businesses that understand succession planning and understand the importance of staff to their business. They invest particularly in trainees and apprentices. They are the ones that keep those traineeship and apprenticeship programs going. It is more likely to be in the kitchen, because that is where our full-time staff are more likely to be.

Mr BRENDAN O'CONNOR—They are highly skilled.

Mr Hart—Yes, absolutely. We have just done, for example, a series of surveys on the skills shortage environment. Increasingly, those restaurants that are investing in training are looking at investing in people that are with them for three or four years whilst they are at university studying something else. They now understand that they have to invest in the training of those people, whereas previously they were the casual workers that came and went. Now we need to consider those as part of our businesses and start to work on their skills.

Ms HALL—Is it fair to say that for restaurants and businesses that you represent being able to have quality of service and quality of food is probably the most important part of your industry?

Mr Hart—Absolutely.

Ms HALL—Do you think there could be an issue about monitoring that quality when you are using labour hire as opposed to employing casuals on a one-to-one basis?

Mr Hart—Yes, I think that is an issue. Certainly, in the environments that I have been involved in personally, where you are looking at a principal-contractor relationship as opposed to an employer-employee relationship, you have to work harder up front to make sure that you set the quality parameters very clearly. I think the way to resolve that quality issue is to be very clear about what quality is required and what quality means to that particular business. But, yes, it is an issue and it is one that needs to be managed very carefully, just like any issue of quality in our businesses.

Ms HALL—On the issue of occupational health and safety: what is the level of injury within the industry?

Mr Hart—The actual statistics do not come to mind. I know that we are sitting at the lower end of incidence.

CHAIR—What is a reportable incident, though?

Ms HALL—An injury.

Mr Hart—I know that our highest category is 'slips, trips and falls', and that is predominantly to do with the types of wet working environments that we work in.

CHAIR—But knife cuts and slight burns will not get reported, will they?

Mr Hart—Many do not.

Ms HALL—It depends how bad they are.

CHAIR—It depends whether their fingers are still there!

Mr Hart—We sit down the lower end of the scale, I guess, in terms of reported incidents, irrespective of the nature of that reporting or whether or not that reporting covers all the incidents. It probably does not in other industries either, but comparatively we are at the lower end. It is an issue for us and we do a lot of work trying to make sure that our members and employers are aware of their obligations. But getting back to the labour hire question: in my experience in the area, particularly in areas such as group training organisations, for example, more work goes on in enhancing the skills of those individuals who are engaged through labour hire organisations than may be able to happen with the staff of a smaller organisation. For example, in a kitchen environment, apprentices who are trained through a group training environment have value added training in occupational health and safety, and they therefore perhaps better understand how they can, by their presence, contribute to the organisation's overall performance in that area than someone who is directly engaged.

Ms HALL—You have half guessed where I am going, because the next question I am going to ask you is about hiring people. Group training aside, is hiring people through a labour hire company of concern to you when it comes to that occupational health and safety area?

Mr Hart—Just to expand the point I made earlier, I think that in occupational health and safety, as in a whole lot of other areas, the key to managing the risk is training. It is about giving people the skills they need to do their jobs and the skills they need to contribute in that working environment. My firm belief is that, in the albeit limited number of organisations that are involved in labour hire in our industry, the level of investment in training is more than businesses are able to invest when they are engaging people directly. So I would suggest it is not an enhancement—

CHAIR—Now to our resident restaurateur and expert in all things food.

Mr VASTA—Mr Hart, when I first owned a restaurant we used a labour hire company to get our kitchen started. We used apprentices who were part of the labour hire company and then, as soon as we got established, we actually employed them and we did not use the labour hire company. Is that still going on? What happened then was that we employed a person to look after the wages. Because of the transient nature of the industry in terms of employees, you had to be up to date on issues such as overtime, double-time-and-a-half and public holidays. It was too much for one of our employees, who would actually be a waitress or something.

Mr BRENDAN O'CONNOR—Are you giving evidence, Ross, or what?

Ms HALL—No, he is not. He is setting it up.

CHAIR—He is leading up to his big question crescendo.

Mr VASTA—I am just leading up to the crescendo. We used a labour hire company to look after the wages then. That was what we did when I left in 1999. We found it was more cost effective not to use the labour hire company for apprentices, but it was cost effective to use it for,

say, the wages. Has that changed in any way? Is it more attractive for people to use labour hire now than it was when I was there?

CHAIR—Basically, you were outsourcing admin aspects of the management.

Mr VASTA—Yes.

Mr Hart—Thank you for the question. In terms of whether outsourcing arrangements are more or less popular than they were, say, five years ago, I do not believe that, across the board, they are more or less popular. It is up to an individual business's cycle. What we will find, if we track back through the data in that five-year period, is that the individual fluctuations in businesses mean that they continue to review whether their roles are best outsourced or whether they are best handled in house. What you say is absolutely right—that is, administrative or clerical roles are far more appropriately outsourced in a restaurant environment where, in most cases, the business is not big enough to sustain a person with a range of skills that is required to do the types of jobs that we outsource in that area.

CHAIR—You would need to have a high level of trust.

Mr Hart—Absolutely.

CHAIR—A lot of these restaurants are simply, as you say, sole operators. A lot of trust is needed to hand your books over to someone.

Mr Hart—Absolutely, but a lot of work comes with their obligations in that area, including the preparation of business activity statements and the like. There is an administrative load, and we simply do not have people in our businesses who sit at desks, and that role is very commonly outsourced. I would like to speak for a moment to outsourcing kitchen apprentices. My experience is that individual businesses come and go, from engaging individuals on a labour hire basis through to engaging them in-house, as they continue to examine their business. Certainly labour hire is more expensive in what they are paying out per hour for an individual employee, and to engage directly will save them some money. Obviously they have to pay for the labour hire company to stay in business, so they are going to pay a premium.

Mr VASTA—And given the small margins—

Mr Hart—Given the small margins of 1½ per cent on turnover, there is no room for error. At points in high demand, particularly in an opening phase where you need to have people brought in on the ground running, a labour hire environment looks pretty good. As they move through the cycle, they will look at how they can save money and engage people directly.

Mr BAKER—Obviously the success or failure of especially restaurants depends upon the quality of the staff. As an owner and employer, you have total control over the quality, what you deliver et cetera. From a labour hire perspective, how much input, if any, does your organisation have into the training and quality of staff within the labour hire situation or organisations? Do you have any control over it?

Mr Hart—We have very little control over it. Although, in advocating any sort of training arrangement that an organisation will enter into, we will always advocate that those arrangements be consistent with the national training framework and the national competency standards. Therefore, within those national competency standards that are detailed within the hospitality training package, we provide guidance in that way through to organisations that are operating any sort of training for their businesses, be they labour hire firms or individual businesses. We try, wherever we can, to get training that is consistent with that national training framework. A huge amount of resources within the hospitality training package give us the tools to get training that is recognised across the country. So, through that vehicle, we do provide some guidance as to what might be, or what might not be, appropriate training.

CHAIR—John, you mentioned that you wanted a much better definition of 'contractor', as opposed to employee. Is there anything in relation to that issue that has not been raised so far that you want to talk to? You also said that the common law test, the multiple factor test, to determine a contractor over an employee does not provide your industry with necessary comfort. You want that to be far more distinctive. Have any test cases from your industry gone to the Industrial Relations Commission where people have considered themselves to be employees but in fact were treated as subcontractors or not part of the structure?

Mr Hart—I am not sure, to be honest with you, whether there are cases that have gone through to that extent. I am happy to go through that with our industrial advocates and each of our state associations and look at it. Certainly, it is exactly those types of cases that we refer to in seeking certainty and comfort. We are certainly aware of cases in other industries where that has been the case, and our industrial advocates and each of the state associations, in discussing with businesses the arrangements they have for engaging labour and managing work forces, go often to this issue of contractor versus employee. So it is making sure that the advice that can be provided to those independent businesses is reliable and consistent and that our businesses can have full comfort that they are doing the right thing in engaging contractors or engaging employees.

CHAIR—What would this concrete test that you refer to in your draft legislation look like?

Mr Hart—As I outlined at the outset, that is not our area of expertise. We are concerned about our businesses being able to be confident that they are fulfilling their obligations, and that is really as far as our organisation's mandate goes. As far as how you can achieve that in a legislative sense goes, far better minds than mine—

CHAIR—So it is basically that as long as we make sure there is no grey area you will be happy to work with whatever that definition is going to be?

Mr Hart—Absolutely.

CHAIR—Okay. It is a big ask.

Mr BAKER— Mr Hart, do you know how many versions of grey there are?

Mr HENRY—I was going to say that it would be difficult to define it without being prescriptive.

CHAIR—That is right. Mr Hart, thank you very much for your evidence. If you have any other information, please let us know about it.

Proceedings suspended from 9.42 a.m. to 10.04 a.m.

PILLER, Ms Yveline, National President, Australian Institute of Interpreters and Translators Inc.; Chair, Pay and Conditions Committee, Australian Institute of Interpreters and Translators Inc.

STEVENSON, Mr Vivian John, Member, Australian Institute of Interpreters and Translators Inc; member, Pay and Conditions Committee, Australian Institute of Interpreters and Translators Inc.

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. I also remind you that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public, but if you have issues that you would like to raise in private then let us know and we will consider your request. I invite you to make a brief statement or some remarks to your submission before we proceed to questions.

Ms Piller—Firstly, we are glad to have this opportunity to speak to you, because we are a small professional group and it is very hard to be heard in general. We want to draw your attention to all sides of contracting arrangements, since independent contracting is the key issue you are working on—in particular, the impact these contracting arrangements can have on individuals when market forces are not balanced. Our submission focuses on those who practise community interpreting, in particular, and we will explain what we mean by community interpreting. In general, interpreters are those who deal with the spoken word, whilst translators deal with the written word. In general, contracting is viewed as something very positive in the community. It is a sign of being independent, of freely choosing to run one's own business, of maximising profit and of wanting to expand, for those contractors supposedly on their own terms. However, we find that this does not really apply in a number of segments of the population—ours and others that I have picked up on in the submissions already on the web site.

The positive image of contracting is predicated on the existence of balanced market forces. In our profession many practitioners have none of the attributes that I have mentioned or the opportunities or alternatives which are supposed to go with balanced market forces. The fact that they are contractors is really the result of pressure from the demand side of the market, and in community interpreting the demand side of the market is the public sector. Against that pressure they have no recourse. They can leave the profession if they are not happy, but they certainly do not get any of the benefits of expansion and improved income that are supposed to be attached to contracting.

On the one hand, we have large government bodies generally or agencies that operate for them. On the other hand, we have isolated individuals. Interpreters, in particular, work as small stand-alone units. So when it comes to contract renewals, for example, the forces in presence are completely imbalanced. The work that interpreters get is arranged either directly with the government body—some government bodies operate that way—or, more typically, through an agency that specialises in translating and interpreting. Those agencies operate by tender. They

put in a bid for government business and, once they have that bid, pass the pressure down to the contractors on their books.

Ms HALL—Is it a type of self-contracting—a brokerage model?

Ms Piller—It would be brokerage—that is how I see it, yes. That is in the majority of cases. They are just presented with a document to sign. The document does not actually promise work; it is generally a framework of conditions. They may or may not receive work and they really have no choice—we have experienced it at first-hand—but to try to discuss the conditions. There are about 100 languages in Australia which are served in this manner—so there are quite a few communities—and we estimate that there are 3,000 to 4,000 interpreters. Our association covers only 800 members, so we are small and it is very difficult.

A lot of interpreters are foreign-born mature women. That is the demographic we have worked out. Some interpreters of some languages may be very busy and able to make a good living but they are very much the exception. Most practitioners work on a part-time basis. Primarily due to the low remuneration they get—there is insufficient money to survive—almost everybody has a second job or a second source of income. Once they sign as a contractor they find themselves unprotected and isolated. They are left to their own devices. They have no contacts, resources, knowledge or skills to carve a better deal for themselves. Even when they try, their efforts are easily disregarded and they are prevented from creating the critical mass that would be necessary to make an impact.

Awards do not apply; unions cannot intervene. The professional association is unable to issue directives and the Trade Practices Act prevents collusion. The contracts they sign require compliance with increasingly onerous conditions—we have put examples in the submission. As contractors, practitioners must provide all the infrastructure of a small business, including a raft of costly insurances such as workers compensation, income protection, public liability and professional indemnity and superannuation. All of that is at their cost. They have home office costs and they must run an accounting system and manage the cash flow. They are rarely paid promptly. They need computer facilities, they need to do research and they are supposed to maintain their skills with training. Yet in return for the demands of that contracting status the pay is very poor. There is a typical $60 fee from some major Commonwealth bodies. That is for a 90-minute assignment that routinely takes up half a day because those assignments are usually in far-flung suburbs.

Mr BRENDAN O'CONNOR—There are no minimum hours in any agreements? Are there three- or four-hour minimums or anything like that?

Ms Piller—There is a variety of arrangements across Australia. The Commonwealth bodies I am referring to usually say there is a minimum 90-minute assignment.

Mr BRENDAN O'CONNOR—It is 90 minutes?

Ms Piller—Yes, 1½ hours. I have a sample contract here. The interpreter is expected to be available to extend that appointment if the appointment goes beyond that. So it is very difficult for them to plan their days. That is in addition to their travel time, which is a considerable element of their day.

Ms HALL—And there is no payment for the travel, as you bring out in your submission.

Ms Piller—That is right. We have calculated that an interpreter who operates full time for one of these bodies makes as little as $20,283 per annum, which is more than $4,000 less than the federal minimum wage. They have none of the potential for expansion or better income, which is assumed to be the reward of contracting, because the sole market available to them is the public sector. They have no upgrade and there is no potential to negotiate anything in their fees to reward experience, education, any special skills or even language demand. There are considerable variations in demand in languages yet everybody is paid the same fee.

Fair competition and the balancing effect of market forces that would arise from decreasing numbers of suppliers do not apply because amongst public sector bodies there is a policy of using people who are qualified under the NAATI system, which I can explain. So they are NAATI accredited interpreters. This policy is disregarded in favour of completely unqualified people—not even practitioners—when accredited ones are not available to work at this low fee level. So the single competitive element that we could present to our clients is completely disregarded in that fashion.

The future for contracting arrangements is bleak for a small group like ours which has very few resources. We are concerned that the overall quality of the pool of community interpreters can only decrease—and is decreasing—and result in situations where the interests of the parties in presence are not served adequately. For example, in court cases or medical appointments, if you have a substandard level of interpreting, the risks are enormous. The interests of the parties would be those of the communities of non-English speakers on the one hand and the public sector institutions on the other hand. We do receive complaints from time to time as the professional association. We have made a number of recommendations. I do not know if you want me to go into them now.

CHAIR—Yes, go ahead.

Ms Piller—To counter the negative impact, what we aim to do is to restore a measure of market power to small operators dealing with very large bodies. We have asked for an inquiry into our profession. There was one run amongst Auslan interpreters—that is, interpreters for the deaf community—which I think was very successful. We think the size of the non-English speaking population, compared to the deaf population, warrants an inquiry. We would also like to see negotiated working conditions and fees which would apply across all state and federal bodies, and I insist on the word ‘negotiated’. We would also like much simpler processes to permit group representation and action.

One of the avenues I have investigated as national president is something called ACCC authorisation, which allows groups of contractors to present a common position and negotiate collectively. For a small group like ours, this is a huge process. It is very expensive and requires considerable legal resources. Those who have made it through had a lot of money. We would need something much simpler to permit a small group to access the same level of fairness. We would like these processes to be built into the contractual arrangements as a matter of course.

We are also suggesting a code of best practice for agencies that tender for the business. We think it will make a more even playing field for all agencies and give a measure of safety to the

public institutions that use the services of practitioners through those agencies. One aspect of tenders that we would like to see implemented is the disclosure of the fees that will be paid to the subcontractors, to the practitioners—which we understand was the case in the Auslan Orima inquiry. That is a summary of the points I wanted to make. Thank you.

CHAIR—Mr Stevenson, do you wish to make any opening comments? We only have eight minutes left and we do want to ask some questions.

Mr Stevenson—I would like to hark back to a point that Ms Piller made before about community interpreting and approaching a definition of it. It can be awkward to define because it can encompass so many different areas—you can find yourself in a medical situation or in a court or tribunal. I tend to think of it as access and equity interpreting. In our country, which is a rule based democracy, we have in place certain principles enacted in law to ensure that people are equal before the law. As a multicultural society, there are many people whose dominant language is not English. When these people interact with our society, in whatever capacity, there are situations where they require the services of an interpreter to give them the same footing as any of us would enjoy.

It is a very skilful occupation—for example, if I were interpreting in a workers compensation or negligence case I would have to understand not only the legal terminology being employed and translate that but also the worker's particular dialect and the names of common tools and work practices in both languages. That requires constant practice. I do not believe it can be done effectively on a one day a month basis. You really need to have committed full-time interpreters to be able to deliver that level of service.

The pay rates as they stand are very low, especially for Commonwealth related jobs—for instance, Commonwealth DPP matters and Commonwealth tribunals such as the Refugee Review Tribunal. They are no incentive to acquire the level of skills which I would regard as appropriate, to maintain them or, in most cases, to remain in the profession. I have progressively opted out of working with the major tribunals in Sydney. Essentially, I no longer practise as a community interpreter after some eight years of doing so. I find I can get a better return for my investment in my education and qualifications by pursuing translating and interpreting in the corporate sector. My qualifications are a master's degree in translation and linguistics; I teach translation and interpreting theory at the University of Western Sydney; and I have written subject manuals on both topics. I am now faced with the proposition of finding students who are keen to explore interpreting opportunities and perhaps make a career of it and, when they ask me what opportunity they have to do so, I have to tell them that based on my experience it is very scant.

CHAIR—Ms Piller, you have made a list of recommendations. What prevents your organisation from being the peak body that will determine those requirements and be the driving force behind that? You are not asking for this to all be done through either state or federal legislation, are you?

Ms Piller—Some perhaps, yes.

CHAIR—There are a lot of professional groups out there that do act as a very strong voice for their members.

Ms Piller—It is an interesting question. The main thing that is preventing us is simply not having the resources. Our income is principally through membership fees, and we receive approximately $65,000 a year in fees. These completely disappear into the few services we can provide members: newsletters, electronic forums and administration.

CHAIR—Who provides the accreditation process for interpreters and translators?

Ms Piller—It completely bypasses us. It goes through a body called NAATI—the National Accreditation Authority for Translators and Interpreters.

CHAIR—Should they be the peak organisation that drives a lot of this consistency and, I guess, empowers the profession in their negotiations in setting fees?

Ms Piller—I do not think they want to be. There are a number of issues that come up, such as what you do with an interpreter who has been found guilty of misconduct. There have been a few cases in the press recently. They do not even have the power to withdraw accreditation. So should they be the peak body? I do not think that is what members want either. Professionals keep telling us that they want a professional association to be the driving body.

Mr Stevenson—There are various levels in the NAATI accreditation system. The basic professional level is level 3. Being at that level does not guarantee you any better pay and conditions than being at an inferior level. The use of level 3 interpreters is recommended but is discretional. So, if they cannot find somebody at level 3 to do that job, they can call in somebody at level 2 or below, which means that if I wish to quote at a certain level I can simply be bypassed. They will find somebody at a lower accreditation level.

Ms Piller—Or with no accreditation at all.

Mr Stevenson—I have submitted or attempted to submit my curriculum to interpreting agencies based on my master's degree and subsequent studies and so forth, and was told not to bother—that the only thing of interest to them was my NAATI accreditation level and the fact that I was punctual and reliable. This means that bodies like AUSIT cannot offer any attraction to people joining, because we offer professional development and some professional solidarity, but none of those professional development activities or even further education carries any weight in the amount of remuneration you can receive. It is a disincentive for people to join AUSIT and further empower themselves, because they do not guarantee themselves any better standard of living.

Mr BRENDAN O'CONNOR—The problem is that your organisation has no recognition as an employee organisation or as a union. You effectively represent employees, but they are not deemed to be employees. Arguably, they could be considered employees, but they are currently being treated as independent contractors.

Ms Piller—Yes, they are.

Mr BRENDAN O'CONNOR—Clearly, the first thing you would have to do to advance some of the recommendations or advance your cause would be to have tested in a civil court whether your members are employees, not independent contractors. From what I have heard, at

least today, and from having read your submission, it seems that your members are at the beck and call of public departments—that is, they are on call effectively to go and do a job. They do not have any other employer bodies that they work for?

Ms Piller—They can have.

Mr BRENDAN O'CONNOR—Can you explain that in terms of translation?

Ms Piller—The relationship with translation?

Mr BRENDAN O'CONNOR—Do they use their translating skills or interpreting skills elsewhere as well?

Ms Piller—It depends a lot on the language. As I said, there are over 100 languages. A handful of people have other opportunities. We deal in French and Spanish—not in interpreting but in translating—and we find a variety of clients. You can imagine that someone who speaks Swahili or Hungarian is not going to have many opportunities outside the public sector. That is one of the factors. Within the public sector, because it is all fragmented, they will be dealing with a variety of bodies independently, as if they were all separate.

Mr BRENDAN O'CONNOR—A large number of your members would receive more than 80 per cent of their income from public departments, though. Would that be right?

Ms Piller—We have not tested it, but that seems a fair figure.

Mr BRENDAN O'CONNOR—The reason I raise that is that if 80 per cent or more of your income is coming from one provider then you are deemed—at least by the ATO—to be an employee.

CHAIR—There may be multiple departments.

Mr BRENDAN O'CONNOR—Arguably, it would be the same employer, if it were the state public sector and so on. What I was really interested in seeing was whether you, as an organisation, had tested the definition of your members in a court.

Ms Piller—No, not in court.

Mr BRENDAN O'CONNOR—I understand the problem you have with resources. But if I were a member of your organisation and I thought that I was not being remunerated properly and I had a very unfair contract, if you like, then certainly it would be wise to consider testing whether I were an employee. It can be an expensive exercise, but it is very important to establish whether in fact your relationship is between contractor and principal or whether it is between an employer and employee. That would be something you would want to consider, I would imagine.

Ms Piller—We have asked a major union about that and there is a big question mark over it. It would be a test case.

Mr BRENDAN O'CONNOR—And then worry about the expense?

Ms Piller—Yes.

Mr Stevenson—I have attempted to market my services directly with some of these departments and they refuse. They tell me they have a contract with an agency—a language service provider—and that if I want to work for them I have to go through the agency. So I cannot access them directly. I have tried to bargain and I have been completely rebuffed. They will not even listen to any kind of arguments that I might want to put. There is simply a status quo and I have to accept it. It is pretty much on a take it or leave it basis. I can vouch for the average yearly income that was quoted before—around $20,000. I have been in that position. It is very difficult to seek legal advice when you are just trying to survive and, as a working community interpreter, you have to fill your diary with appointments.

Ms HALL—Would you like to see a situation where people have to have a particular level of accreditation before they could, say, interpret in a court or in a health situation, and so give you some control over what is happening?

Ms Piller—We would support that course. We want to provide a quality service and obviously we want to have a chip to bargain with. A lot of the guidelines applicable to those institutions do specify levels—

Ms HALL—That is what I thought.

Ms Piller—But it is always 'if available'. If it is not available, the standards just go down. In my language, French, where there are thousands of accredited people at level 3 and level 2, I recently met a so-called level 0.

Mr BRENDAN O'CONNOR—A level 0?

Ms Piller—It is somebody without skills. I heard that person practising and their skills are very low—negligible. The levels of fees are kept stable but the requirements are being pushed down, so we would certainly support accreditation.

CHAIR—Thank you very much. We are running out of time. I guess the only reason I asked about accreditation and you being a driving force is that I am a member of a professional organisation and I know that professional organisations have significant bargaining power. It takes them years to get that. Has there been any discussions about you and NAATI joining forces and perhaps merging and creating that critical mass of voice for interpreters?

Ms Piller—NAATI is a body that is owned and run by the Commonwealth and state governments. About 17 years ago they decided to help set up the professional organisation that we are, so I doubt that they would want that. I have raised issues of remuneration with them. They have never shown an interest.

CHAIR—Thank you. I am sorry it was short, but it was valuable nevertheless.

[10.33 a.m.]

HUNT, Mrs Jennifer, Solicitor, Workplace Relations and Corporate, Manpower Services

NOCK, Ms Vicki, General Manager, Marketing, Knowledge and Innovation, Manpower Services

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as proceedings of the House itself. It is customary also at this time to remind you that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public but, if you have issues that you would like to raise in private, let us know and we will consider your request. We thank you for coming in. Manpower is not unknown to us—you are regulars at parliamentary committees, so you will be familiar with the format and the process. Would you like to make any opening comments? Then we will move into questions and answers.

Ms Nock—We tackled this submission by looking at where the labour hire industry is at the moment and obviously by looking at the overriding issue of skill shortages within the workplace. It is Manpower's view that we need to keep workplace practices not only as fair as possible but also as flexible as possible so as to increase opportunity for increased workplace participation, particularly as we are moving into tighter and tighter skill shortages. Each year we fill 85,000 jobs throughout the country, whether permanent or temporary. We have got strong representation in all states, including the likes of Tasmania and Western Australia. It is important for us obviously to work with our clients to find them the appropriate skills and resources and to encourage our clients to look at alternative methods of employment to encourage people to enter the work force.

Mrs Hunt—In respect of independent contracting, Manpower is predominantly an employer. It engages over 90 per cent of its employees as casual employees and the remainder as permanent employees in particular circumstances. Only a very small percentage of its people are engaged as independent contractors and they are in high-skill areas such as IT and engineering. We are certainly aware of the range of independent contracting that takes place across the labour hire industry and with independent contractors as well. We believe it is a very confusing area. We note the committee's reference about possible legislation. Our submission dealt with the fact that we do not know that there is one particular answer to deal with independent contracting. Whether there will be a set of indicia that might assist the parties, we do not know, and I think that there should be some further debate and some further involvement from all of the respective parties.

Currently, the common law is the predominant test and we see in the various jurisdictions different views taken in respect of that. Recently, the Supreme Court of Western Australia decided that there was an independent contracting relationship with one particular party, and then we heard in the Court of Appeal in New South Wales that similar sorts of circumstances may not be the same. So it is a confusing area. It really is not determined until it is tested in the

courts. This could lead to parties not really knowing their rights, risks and responsibilities. So we do not know what the answer is but we do support legitimate bona fide contracting.

CHAIR—You want consistency across the jurisdictions?

Mrs Hunt—That would be very helpful. Obviously there is no consistency across the workplace relations jurisdictions. But even more so with respect to independent contracting we are at the whim of the respective courts.

CHAIR—I am sure that members of the committee have got a number of questions. To begin with, just to clarify, Manpower is a labour hire company but you also have independent contractors on your books?

Ms Nock—That is correct—a very small minority.

CHAIR—What would be the proportion?

Mrs Hunt—It would be overwhelmingly 99 per cent of employees—

CHAIR—They are labour hire?

Mrs Hunt—That is correct.

CHAIR—You call it 'on-hired'—I had not heard that term before.

Mrs Hunt—We are in the Recruitment, Consulting and Services Association, the RCSA, which is the peak body. We prefer the term 'on-hired' because it can encompass all of the relationships and not just labour hire. It can encompass contracting out the full-blown services that organisations such as Skilled provide in terms of whole factories et cetera.

CHAIR—The other point you make is in regard to the Commonwealth test. While you believe it is a fair test, you also believe that it has been slow to move with community attitudes.

Mrs Hunt—It appears that organisations such as ODCO—

CHAIR—Which is?

Mrs Hunt—ODCO is a test case from the early 1980s that went to the High Court. You might know it as Troubleshooters. The High Court and the Federal Court determined that in some arrangements people can be determined as independent contractors. It has been branded as ODCO and is now franchised around the country. I believe that ODCO may make submissions to this inquiry. I also note that the minister just yesterday tabled a paper—

CHAIR—He released a discussion paper.

Mrs Hunt—That is right—and that certainly supports and promotes the ODCO type arrangement. Manpower supports legitimate, bona fide contracting, and in respect of ODCO we

respectfully disagree that any single type of labour arrangement can be contracted out. For example, they promote the contracting out of clerical employees and process workers. We would not do that. We do not believe that a bona fide contractual relationship should be entered into with an individual cleaner, for example, in those circumstances.

CHAIR—Why not?

Mrs Hunt—Unless they have fully set themselves up properly, there is reasonably unequal bargaining power, and we do not believe that requiring somebody who is today an employee to get themselves an ABN, all of their insurances et cetera so that tomorrow they can be a contractor is a legitimate form of business. We do not support that.

CHAIR—We have it in other industries. Yesterday we even heard from the Transport Workers Union regarding owner-drivers. That is a similar situation where somebody is set up as an individual business.

Mrs Hunt—Where parties are required to obtain capital, equipment et cetera that may be legitimate and where people use tools of the mind, such as in the IT industry, that might also be legitimate, but they are highly skilled people. Manpower does not support low-skilled contracting out.

Mr HENRY—Is that because there is a risk management issue in terms of liability?

Mrs Hunt—In terms of the bargaining power as well. The control test is the predominant test used by the courts. We do not believe that having an administration assistant who supposedly has all of the skills of the mind that an engineer might have is necessarily bona fide or legitimate.

Mr BRENDAN O'CONNOR—In your experience as a company, has that conversion or attempted conversion from employee to contractor been in many instances as a result of duress—that is, take it or leave it; today you are an employee cleaning in the building and your current employer says, 'I put it to you now that if you want to continue working here you will have to work here on the basis of being a business,' and effectively suggests that you get an ABN or look for other employment?

Mrs Hunt—We are aware that it happens, but we have never experienced it. Our IT people come to us, and they are already set up as bona fide contractors. We have never experienced a circumstance where people are employees one day and the next day are forced to be independent contractors. We are aware anecdotally that it happens, but Manpower has never been in that position.

CHAIR—So you say the skill level that is required for the job is the defining characteristic.

Mrs Hunt—That is right.

CHAIR—Yet a lot of organisations—I am not making a judgment; I am just trying to clarify here—rightly or wrongly, outsourced their maintenance departments. I would have thought that in a maintenance department you would have a full range of skills present, from your fitters and

turners and your qualified tradies all the way down to perhaps your trade assistants. Would you disapprove of that type of arrangement?

Ms Nock—No. I think it is the trade skill of a maintenance person such as a plumber. They would have themselves set up quite comfortably as an independent contractor. We are concerned where we see the likes of—and I cite an instance I am aware of from when I was in operations—labourers who are almost doing roadworks but who are supposedly employed as independent contractors. They are not the kind of person who has gone out to naturally source that kind of arrangement. Independent contracting should cover both white-collar professionals and skilled trades personnel, but I do not believe it is necessarily a fair practice for people in a clerical or labouring—

CHAIR—It is okay for them to be part of a labour hire company but not a subcontractor?

Mrs Hunt—In respect of contracting out a whole maintenance division, certainly a principal would be responsible for doing that, but they might further engage C10 tradesmen as a bona fide contractors, because those people know what they are doing and do not need to be told how to do their job. However, a process worker, for example, might be under direct supervision, and we respectfully submit that they should be an employee.

CHAIR—I have one more question. You are the most significant labour hire organisation that has presented to us at this stage. There has been some discussion by other witnesses about introducing an accreditation scheme so that we do not have a proliferation of labour hire organisations setting themselves up. In fact, we heard yesterday from the first organisation—

Ms HALL—AiG.

CHAIR—Yes. We heard about the four levels and about you guys—Manpower—Adecco and a few others being in that top level. I asked the question: how easy is it to simply put up a shingle and say: 'I'm a labour hire company. Employ me.' The answer was to perhaps introduce some sort of accreditation or licensing regime. What is your reaction to that?

Ms Nock—Not that you necessarily want to hear what other countries did but I am from South Africa, and I was there at the time when they changed the whole of the employment equity laws and brought in a bill of rights et cetera. They divided the industry into two, and exactly along those lines. We did not all want to be classified as labour hire because there was good and bad and fair and unfair within labour hire. Essentially, you had two licences: you were either a labour hire broker or a recruitment consultant. You had to meet certain criteria in order to achieve that.

Mrs Hunt—Currently the industry is self-regulated by membership of the RCSA. The code of conduct has been approved by the ACCC, such that it does not offend competition requirements. The RCSA does discipline its members. It has an ethics committee. But, of course, you need to be a member of the RCSA.

Mr BRENDAN O'CONNOR—So, if you are not a member, you can do what you like.

Mrs Hunt—That is correct.

CHAIR—Getting back to my question, would you agree with an accreditation system or a licensing system being introduced?

Mrs Hunt—I do not have instructions on that. If there were to be a system, we would suggest it be national. Recently the New South Wales system was repealed. It simply required you to show that in each office of your branch you had somebody of good character. That was pretty much it. I know that in Victoria, with the parliamentary committee inquiry taking place there, they are also considering licensing. We do not want licensing in each and every state. We would prefer, if there is to be any licensing, that it be federal. I do not know how that would happen.

Mr BAKER—That would be interesting for you: different legislation in every state when you are a national company.

Ms HALL—I have a couple of questions. I want to tidy up what you were saying before. So the issue is looking at the power, the equality, in the negotiating between the two parties. You strongly believe that, with the lower skilled jobs, that power relationship is skewed.

Mrs Hunt—Currently, the common law indicia serve the parties reasonably well. The predominant test is the control test. You have to be able to do your job, be responsible for your job—fix it up if you do not get it right. That should be done by high-skilled people. Low-skilled people should be employees, in our view.

Ms HALL—So that is what Manpower support.

Mrs Hunt—Yes. We support legitimate bona fide, and it always comes down to one's interpretation of what is legitimate bona fide. It is only when you get to the court that it can be tested.

CHAIR—Therefore the common law test, the control test, is not sufficient.

Mrs Hunt—Arguably so, because parties really do not know their risks and responsibilities until such time as it is tested.

Ms HALL—Looking at labour hire and how it operates, do you think that, in some cases, the use of labour hire employees is used to break down the conditions of employees within that industry and to lower the level of remuneration?

Mrs Hunt—No, we do not support that at all. Casuals who are predominantly employed in the labour hire industry receive very substantial casual loadings. They can range up to 33⅓ per cent. The Australian Industrial Relations Commission, in a major test case about four years ago, said that a reasonable casual loading is 25 per cent. That covers for all of the conditions that casual employees otherwise miss out on. Overwhelmingly, site rates are paid within the industry. That is always at the behest of the client, though. Certainly, from Manpower's position, in over 80 per cent or so of our clients' premises we pay site rates. Employees are getting the client's EBA award rate plus casual loading. So we do not believe that labour hire employees are missing out on conditions otherwise enjoyed by our clients' employees.

Ms HALL—What is the average length of time that a person remains with a host employer? What would be the longest period of time that you have had a worker remain with a host employer?

Mr BRENDAN O'CONNOR—Do you mean as a casual employee and not a permanent position?

Ms HALL—I mean with a host employer.

Mrs Hunt—Assignments can last from four hours to several years. Certainly, where we have formed very solid relationships with our large clients, our employees have been there for four, five or six years.

Ms HALL—As casuals?

Mrs Hunt—Sometimes as casuals and sometimes as permanent employees.

Ms Nock—Currently 52 per cent of our open order base is for permanent jobs, so, even though we are known predominantly as a temporary labour hire organisation, we do have a high volume of permanent jobs. It would be great if we could fill that 52 per cent, but it gives you an idea. It is the federal metals award that allows casuals to elect to go permanent after six months; we have a very small percentage that actually elects to go permanent.

Mrs Hunt—That is right; they prefer the casual loading.

Mr BRENDAN O'CONNOR—Is that because these are low paid workers and they cannot afford to lose the casual loading?

Mrs Hunt—We do not believe they are low paid. They are currently being paid site rates, so they are being paid—

Mr BRENDAN O'CONNOR—What sort of annual income are you talking about?

Mrs Hunt—I cannot answer that, but the base rate of their colleagues working in the client's premises plus 25 per cent.

Mr BRENDAN O'CONNOR—Yes, but you are talking about the lower rates of the metals award. We could be talking about $30,000 a year.

Mrs Hunt—We could be.

Mr BRENDAN O'CONNOR—They are not necessarily highly paid, so the 25 per cent casual loading is a large sum of money to forfeit to get entitlements.

Mrs Hunt—It is at their election.

Mr BRENDAN O'CONNOR—Yes, I accept that.

Mrs Hunt—They would otherwise be paid at the same rate as their colleagues being employed by the client. They are not missing out.

Mr BRENDAN O'CONNOR—We could argue about that all day. They are not getting holiday leave.

CHAIR—I want to go back to Ms Hall's question that some of your people are on site for up to four years.

Ms HALL—Seven, didn't you say?

Mrs Hunt—We do have some experiences where—

CHAIR—For four, five, six or seven years these people are in a particular organisation and working. They are your people but they are working for company X. Are they doing a job which is unique to the arrangement you have got, or are they sitting side by side with someone who is doing the same job but is an employee of the client?

Mrs Hunt—It can be both. It is very unusual to have the length of an assignment last for seven years.

CHAIR—Why would you do that?

Mrs Hunt—Often it is international organisations which might have headcount issues of their own, and we provide a full HR—

Mr BRENDAN O'CONNOR—What does that mean?

Mrs Hunt—They might not be able to employ the people themselves because of their, for example, US headcount restrictions. In this particular assignment, it is our largest client. We provide the full HR outsourced provision for them. We are on site with scores of people providing all of their HR services. Those people are there for a number of years and the client is very happy, we are happy and the people who are receiving—

CHAIR—So it is a whole function. I was referring more to the point of view where they are sitting side by side: someone is doing a HR role that is employed through Manpower and they are in an organisation for five years and there is an employee HR person there as well. Do you have that kind of situation?

Ms Nock—There may well be. Four to five years is probably pushing it. I would say, comfortably, we have that arrangement happening within a year where there might be a permanent person doing exactly the same task as a person who is there on a temporary basis. In today's market, I would be very surprised if that person was there for longer than a year and did not at least get some kind of offer of permanency provided to them. We are definitely finding that as the skills market tightens, there are probably more permanent jobs out there for people.

Mr HENRY—Ms Hall spoke about the suggested impact on employment conditions through labour hire, but there have also been a number of submissions that have suggested that labour

hire has had an adverse impact on training and, consequently, to some extent has led to the skills shortages. Would you like to comment on that?

Ms Nock—I hear and understand what you say. I cannot comment for the whole of the industry. I can say that as an organisation each candidate who is not only registered with us but is also placed with us or with part of our organisation in a permanent job has access to over 1,800 online courses which cover a number of different areas. If we are placing a candidate in, for example, the food industry, we actually put them, prior to going into that organisation, through a good manufacturing practice course and actually test their skills afterwards. Once they are in our employment, we provide them with access to ongoing training.

Mr HENRY—You spoke about the labour hire approach compared with taking on skilled tradesmen, but what about the situation in terms of skilled trades and apprenticeship training? Do you provide any support for that type of training?

Ms Nock—We do have flexible arrangements with clients whereby we will support the supply and employment of apprentices.

Mrs Hunt—We certainly have a large range of trainees within our Defence Force recruiting area within our own offices, so we are taking trainees on more and more.

Mr HENRY—I suppose the element of concern is largely around the traditional trades area given the reduction in availability of skills in that area, which you say is an area that your labour hire operations target in terms of the blue-collar work.

Ms Nock—Yes.

Mr BAKER—I wish to follow on from what Jill and Stuart said. Yesterday we heard from unions that labour hire workers experience reduced conditions, reduced salary et cetera. Encompassing all of that in one question, given what you said about that perspective and also when compared to that of an actual employee, I am interested in your comments. It was stated yesterday that a recent survey conducted on behalf of RMIT University found 66 per cent of labour hire employees said they would prefer to be employed directly by their host employer. In the same survey 64 per cent of casual employees said they would prefer to exchange their casual loading for permanent entitlements—for example, annual leave, sick leave, redundancy pay et cetera.

Mrs Hunt—That has not been our experience in respect of the second item. We gave evidence in some Australian Industrial Relations Commission matters that over 500 metal employees were offered the ability to go permanent and only two or three or so of those even considered it and took it up. We are told overwhelmingly that they would prefer to stay on their casual loading. With respect to the union submissions, the AIRC has determined in respect of the award that 25 per cent more than compensates employees for loss of annual leave, sick leave, public holidays, redundancy notice et cetera.

Mr BAKER—You can see that from our perspective it is conflicting.

Mr BRENDAN O'CONNOR—But that survey was not a union survey; that was an employer survey.

CHAIR—It was an RMIT one.

Mr BRENDAN O'CONNOR—But it was commissioned by an employer body.

CHAIR—With what I am about to ask I am not trying to get commercial-in-confidence information from you. What would you be charging or what kind of margin do you put on it?

Ms Nock—It ranges, to be honest.

CHAIR—If I am one of your client organisations, obviously I am paying you a premium but you still have all those liabilities—salaries, and loadings because they are casuals. I imagine you carry superannuation for your people.

Mrs Hunt—We call them burdens. They are a straight on-charge to the clients.

CHAIR—Is it a cost issue for me to use you or am I making that decision for other reasons?

Ms Nock—From an accounting point of view, it is making the cost a variable cost, not a fixed cost.

Mr BRENDAN O'CONNOR—In relation to that, why wouldn't an employer just employ a casual employee rather than actually enlist someone from a labour hire company, given that they have only to give one hour's notice to a casual employee if there is a problem with fluctuation?

Ms Nock—So that is if the casual is employed directly by the employer?

Mr BRENDAN O'CONNOR—Yes.

Ms Nock—For one thing, you can employ directly through yourself—that is not a problem—but how do you know you are getting the kind of skill level that you are actually requiring?

Mr BRENDAN O'CONNOR—If you do not like it, you can sack him with one hour's notice.

CHAIR—So you are carrying the risk of the employee's performance quality?

Mrs Hunt—Even finding people. People come to our organisations and know that they can get a job with us, whereas a client or a host might have to advertise and be bothered with 20 inquiries resulting in only two suitably qualified people.

CHAIR—That is worth something to me; that is why I would be paying a margin.

Mr HENRY—It is also the ongoing administrative cost of managing an employee payroll et cetera, isn't it?

Mrs Hunt—That is right.

Ms HALL—The thing I found interesting that you said was that, with your international employees, it is basically shifting the cost from one line to another line, isn't it? Looking at the HR line, and looking at the number of employees they are employing, it is out there as a different cost to the one that it was before.

Ms Nock—Was that the comment about the US?

CHAIR—Yes.

Ms Nock—With regard to how the US reports onto their stock exchange, they report in terms of a cost per head count in their business. So, if they have a reduced permanent headcount, it makes their reporting better. I make a comment about benefits, which you mentioned. We do have in place quite an extensive benefits program. Last year we negotiated with a major bank that they would recognise labour hire or casual employment as essentially full-time continuous employment and that casuals would be able to access home loans. We got that agreement from a major national bank. As part of that, we also have a discounted medical care arrangement with them so that casuals can access private medical care at discounted rates.

Mr BRENDAN O'CONNOR—How does the home loan one work, for example?

Ms Nock—Like any person, they still have to show they have continuous employment, but it does not necessarily have to be only with us; it can be through Kelly, it can be with Adecco—any organisation. Like anyone, they need to go through a credit check, but the bank will recognise that casual employment can be continuous.

Mr BRENDAN O'CONNOR—Which bank is this?

CHAIR—Is that because of the size of your organisation, or do other labour hire companies also have that?

Mrs Hunt—Evidence has recently been given to the secure employment test case in the New South Wales Industrial Relations Commission that, whilst it is a criterion—it might be a box filled in on the form labelled 'casual'—the banks do consider the person's income over the year.

Mr BRENDAN O'CONNOR—Because they can always take their home away.

Mr BAKER—With regard to licensing to get rid of some of these alleged accusations about reduced conditions, would you support a licensing regime moving forward to more regulation, or do you prefer it more deregulated?

Mrs Hunt—As RCSA members, we believe that the current provisions in the code of conduct are sufficient for the members. It does, of course, leave out non-members. That might be an issue for your consideration.

Mr BAKER—To remove some of the cowboys.

Mrs Hunt—There are cowboys in every industry.

Mr BAKER—Exactly.

Mrs Hunt—We do not think cowboys would last terribly long, because our clients are increasingly looking for larger organisations. There are typically master vendor arrangements whereby we are asked to be the principal and, if we cannot source the labour directly, we go and find reputable organisations. That is increasingly becoming more prominent as well. With regard to the RMIT study, I think you may have seen the HILDA study that came out recently which talked about casuals. They are using labour hire to get a foot into the client's premises. They are increasingly coming from a non-working background—for example, mothers who have been out of the work force—using labour hire to get that initial experience and then being much more employable. We are very supportive of that HILDA finding.

Mr BRENDAN O'CONNOR—It is almost like a probation process whereby you see host employers consider picking up one of your staff and at some point they can then go for a permanent position because employers have literally watched them work.

Mrs Hunt—That certainly happens.

Ms Nock—If you look at the generation that we are dealing with now, generation Y, they like flexibility, they like change, they like differences. In a lot of instances, they choose this as a career path so that they get that increased stimulation and opportunity.

Mr HENRY—Following on from that, in your submission you quote the Productivity Commission report on the growth of labour hire and employment in Australia, which states that labour-hire employees now constitute some 2.9 per cent of all employed persons. Do you see a continued growth in this particular area of operation in employment form?

Ms Nock—I think there needs to be. If we just look at the issue of the ageing population, more and more people are going to be forced into roles of carers. Those people, in a lot of instances, are not able to work in continuous, permanent employment. They need flexibility and we need to make sure that we have flexibility that enhances all aspects of people throughout their lives.

Mr HENRY—But that is the ageing demographic and you just spoke about generation Y. They want more flexibility too, so there is going to be growth across the age spectrum.

Ms Nock—Yes, and there will be challenges for organisations like ours to engage generation Y and make sure we manage them from company to company. We work quite diligently at retaining our work force because every time we have to go out and spend money on advertising it costs us dramatically.

Mr HENRY—You want to retain these people in labour hire; therefore the issue of probation and going to an employer on a labour hire basis and seeking full employment is not something that you would encourage?

Ms Nock—We do, because at the end of the day we have two businesses: permanent and temporary. So we support both channels within the industry. To be honest, we get more margin for a permanent placement than we do for a temporary one. A permanent placement involves one recruit down to a bottom line; a temporary placement involves a host of issues that go on. That is why we employ Mrs Hunt. If we were only doing permanent placement we probably would not have the need for Jennifer.

Mr VASTA—You spoke before about burdens. Do you think that occupational health and safety is a burden? Is the training involved in that classified as a burden?

Mrs Hunt—No, when we speak about the cost to the client we talk about the base rate of pay. Burdens include all the statutory entitlements: payroll tax, superannuation and the OH&S levy in the respective states. Manpower has a very sophisticated occupational health and safety system. It is a separate division within Manpower. We see it as our cost but we wish to work more closely with our clients.

Mr VASTA—Can you elaborate on that occupational health and safety aspect of your business?

Mrs Hunt—We have people in each state who assist with each of the branches, and we go and do a review of our client's site before we send people out to the premises. So we make sure that in our view it is a safe site.

CHAIR—As part of your contractual agreement with the host employer, do you assume responsibility for OH&S?

Mrs Hunt—There is always going to be dual responsibility, in our view. Whilst the worker's comp claim is made against Manpower—

CHAIR—I understand that but sometimes that is not well known by employers.

Mr BRENDAN O'CONNOR—If someone is injured, how do you find alternative work for them?

Mrs Hunt—We certainly try to rehabilitate them. We try to get them back into that premises and if that is not possible we try to find them work elsewhere, even within our office. It is a difficult task trying to get the client's assistance but we certainly endeavour to do that.

CHAIR—A big criticism that is made about labour hire companies is that when a worker is injured there is not an opportunity for them to be rehabilitated back into that organisation or into a similar job. That is the criticism that is made, but you are saying that in your organisation you provide that service.

Mrs Hunt—It is in our best interests to; otherwise we continue to wear the factoring of that employee. So if we cannot find them work in that client site we might try something innovative and try to find them work at another client site where, for example, we charge them a lower margin. We might say, 'We are rehabilitating this employee but we will not charge you full margin.'

Mr BRENDAN O'CONNOR—And that keeps your burdens down.

Ms HALL—That is how it should work and it is really good to hear of an employer that is doing that. What would you say are the main OH&S issues for your organisation?

Mrs Hunt—The main issue, always, is getting the assistance of the client. Our people who go out and inspect the client's premises are not always going to be trained specifically in OH&S. We give them as much training as possible but they are not design engineers who know every single piece of equipment. Nor are our clients, though; they might install equipment that they are not fully conversant with. So that is always going to be a problem.

Ms HALL—Do you have any occupational therapists et cetera employed by you?

Ms Nock—No, we subcontract that out. We have a national occupational health risk manager. In 1996 when we started up the organisation in Australia we bought a risk management company that still assists us to this day.

Mr BAKER—You stated before that there were over 1,000 training courses. Can you envisage moving on with the current skills shortage actually taking on apprentices, as Skilled do?

Mrs Hunt—Skilled are much more blue collar than we are. We are very much white collar and light industrial. They outsource an entire project, so they have that ability. I do not foresee in the near future that we might have that ability.

Mr BRENDAN O'CONNOR—Are you a respondent to any federal awards?

Mrs Hunt—Yes, we are a member of the AiG.

Mr BRENDAN O'CONNOR—What are the main awards that your employees work under?

Mrs Hunt—Federal metals, obviously the various clerical awards in each state, food awards and vehicle manufacturing.

Mr BRENDAN O'CONNOR—Are you a respondent to enterprise agreements?

Mrs Hunt—No. We do have a small number of our own enterprise agreements in particular industries.

CHAIR—The range of jobs you have is fairly extensive, isn't it?

Mrs Hunt—Absolutely.

CHAIR—They range from one end to the other—which is good. Thank you very much. If there is any other information you would like to provide us with, please feel free to do so.

Proceedings suspended from 11.12 a.m. to 11.28 a.m.

DELL, Mr Leslie Samuel, Executive Director, Direct Selling Association of Australia Inc.

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently they warrant the same respect as the proceedings of the House itself. It is customary for us to remind witnesses at this moment that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. With those sobering words, let me also say that the committee prefers to hear evidence in public. If you have issues that you would like to raise privately, then let us know and we will go into a private hearing to consider your information.

Mr Dell—I have no such issues.

CHAIR—Would you like to make any introductory comments or remarks based on your submission?

Mr Dell—I have put in a brief submission, and I imagine each member of the committee has that and, hopefully, has read it. There are a couple of other things that I would like to add which were not spelled out in the submission. In the industry that I represent, the whole question of independence of salespeople, who are the predominant people in the industry, for obvious reasons, is a constant, ongoing battle of putting out fires in quite a number of jurisdictions. We see the federal government's proposal as an opportunity to crystallise some of that and provide what we might loosely call a safe harbour for independent contractors to get us out of the constant firefighting and arguing over the common law tests that have been built up over the last half century and which can become more complicated with every case that is heard. So we see this as somewhat in the area of providing a safe harbour, and it would be our intention, so far as we can influence it or assist the process, to end up in that position.

One of the problems with independent contractors in our industry at the moment is that our members can put an enormous amount of resources—human, legal and financial—into designing contracts and creating a relationship with independent salespeople and think they are in a safe harbour from the start. But, somewhere down the track, something happens with one of these salespeople and the thing goes to court, so retrospectively it is determined by somebody—normally a judge or a magistrate—that this is not an independent contracting arrangement at all. I think I mentioned in my report the integrity of the written agreement—people cannot hide a relationship by simply entering into a written agreement. The real relationship resides, I think, in the behaviour of the parties in their everyday dealings, so the integrity of the relationship and the integrity of the written agreement has to be at all times supported by the day-to-day business behaviour of these people. That question is not in doubt. But what is in doubt is that what some people may think is an arrangement that creates an independent contractor arrangement is not necessarily what somebody else thinks it is. So we are looking for that safe harbour.

There seems to be a tendency now for a number of bodies to move towards the alienation of personal services income group of provisions in the Income Tax Act to provide a decent starting point for something that will be a lot more definite, a lot more concrete and a lot more secure than the sometimes convoluted common law test that we all tend to live with. The problem with

the common law test is that it all happens down the back; we are concerned about what happens up the front. So it is that safe harbour arrangement, and we do not like to fight fires. If we could get away from that in all these other jurisdictions, state and federal, that would be a giant step forward for industry, because it becomes very non-cost-effective to be devoting time, energy and resources to these issues when they could be more productively used elsewhere.

However, having said all that, we would introduce a note of caution here, because the Direct Selling Association is a very conservative industry association and has been for all of its 38 years, and I think we need to at least get on the table the thought that in creating this safe harbour and this new approach to independent contracting we do not open the gate to providing opportunities for people who might be less scrupulous than we are to opt out of employment obligations. So I think that is always going to be an issue and I think that we need to keep in mind that, if we go down a certain path, we need to make sure that that does not give people the opportunity to hide what are basically employment arrangements. With those opening remarks, I am happy to answer any questions.

CHAIR—Have there been cases through your association that you know of where this has actually been tested in the courts?

Mr Dell—Yes. There have been two major cases that affect our industry. One was a Victorian payroll tax case in 1980 or thereabouts. Our member was Mary Kay cosmetics. The Victorian government issued payroll tax assessments arbitrarily for a number of years based on the fact that they imposed a payroll tax on the commission earnings of Mary Kay's independent sales agents. That was heard by a single judge in the lower court in Victoria who found in Mary Kay's favour. The collector of revenue in Victoria subsequently appealed that and it went to a court of appeal, which unanimously upheld the decision of the lower court. The Mary Kay case has become a yardstick. That case was fought on written documentation that Mary Kay had with each of its distributors.

The other case was a federal income tax case known as the World Book case, where the Australian tax office issued an assessment against World Book for income tax that it should have deducted from the commission earnings of the book salesman. That case also went through several courts and the courts consistently found in favour of World Book—that these people were in fact independent, that they were not employees and that they did not come within the provisions of the Income Tax Act that required the deduction of income tax.

Mr BRENDAN O'CONNOR—Can you recall how they distinguished between employees and independent contractors?

Mr Dell—Essentially it was a question of control, and that question of control of course is the thread that runs right through the common law test—it is about the degree of control.

Mr BRENDAN O'CONNOR—So they concluded that there was not sufficient control for them to be defined as employees.

Mr Dell—There was not sufficient control to make these people employees.

CHAIR—So, just to clarify, Mary Kay won their case?

Mr Dell—Yes, Mary Kay won their case, as World Book won their case against the tax commissioner.

Mr BRENDAN O'CONNOR—So both state and federal tax offices lost their tax?

Mr Dell—Yes.

CHAIR—So you are saying that the common law test of control is sufficient to define the employer-employee-contractor definition.

Mr Dell—It is if you are happy to wait for a retrospective court case. It would be nice to know up front.

CHAIR—Your industry is fortunate in that at least you have had two cases which have gone through as test cases. Some other industries have not had that benchmark.

Mr Dell—I should report to you in the interests of fairness and truth that there was a case in New South Wales about two years ago against one of our members, Bessemer sales. Bessemer is a company involved in the cookware business. It is a very old company. One of their distributors hurt herself on the company's premises. She was there to pick up an order. She sat on a table in the waiting room, which collapsed, and she did herself an injury. After a lot of hoo-ha with the insurers it went to the industrial relations court here, and Justice Giles determined that this lady was in fact a worker for the purposes of the act. We dispute that. The matter is now waiting for an appeal. That will go to the New South Wales Court of Appeal on 24 May, from memory. It will be an application to seek leave to appeal, because the thing went out of time, for some reason. So there is an application before the New South Wales Court of Appeal for leave to appeal. That is where that case stands. We hotly dispute that, and most of the lawyers we have spoken to say that they believe it will be overturned. That was a decision out of the District Court in New South Wales.

CHAIR—In 2.6 of your submission you go through what should be in a written contract to provide that certainty. You are saying that these five points are sufficient, that as long as the relationship is protected through a written agreement which encompasses these things or answers them then that will be fine.

Mr Dell—We would hope so. That 2.6 encapsulates the issues in the alienation of personal services income, very largely. We have a ruling from the Australian Taxation Office that direct sellers are outside of these arrangements because they fit this description, they fit the exemption. Our people provide their own tools, they fix up their own mistakes.

CHAIR—Do they provide their own tools?

Mr Dell—Yes, whatever tools they need, all the literature.

CHAIR—I am thinking of organisations like Mary Kay and Nutrimetics.

Mr Dell—All that literature that they hand your wife is all paid for. They have to buy that; it is not given to them.

Mr VASTA—Don't they use their own cars?

Mr Dell—They use their own cars, their own telephones.

Ms HALL—Unless they get one of those pink ones that parks in my parking space.

CHAIR—That is right—unless they reach a certain level of sales and have a number of teams underneath them. Those organisations have always intrigued me. They obviously have a relationship direct with the state division—say, Nutrimetics or Mary Kay—but a lot of them also have teams of people underneath them. Are they obliged, in order to protect themselves, to also have these written agreements?

Mr Dell—No.

CHAIR—Is the agreement always between the direct seller and Mary Kay, not the distributor, the manager for that particular team?

Mr Dell—I would be very surprised. I am not aware of any contractual relationship established between levels in the field, as we say.

CHAIR—So, while I may have attracted you into the organisation and I distribute to you and someone else is distributing to me, the agreement is still between you and the peak organisation.

Mr Dell—The only way I can attract you into the organisation is for you to sign the same agreement that I signed. You become part of my team but you have signed the same agreement, and the company treats us both the same except that I am a manager so I will get some additional benefits and I will go to some extra meetings.

Mr BRENDAN O'CONNOR—You have heard of the entrepreneur's tax offset?

Mr Dell—Yes.

Mr BRENDAN O'CONNOR—How does that apply?

Mr Dell—We have made a submission on that to the minister. Frankly, we are not happy about that.

Mr BRENDAN O'CONNOR—Is this in terms of how it affects your members?

Mr Dell—It is discriminatory in the way it affects our members inasmuch as the great majority of our members operate on the basis of being wholesalers. They sell the goods to their independent salesperson, who in turn sells it to the customer—so ownership passes from Nutrimetics, to the Nutrimetics consultant, to the customer. However, there are still a small number of our members who operate on an agency basis. They are retailers. They do not sell their products to their independent salespeople; they sell them direct to the consumer through the introduction services provided by their independent salesperson.

So in one respect the independent salesperson is simply an agent, and her income is made up totally of commission earnings. In measuring the size of her business and looking at turnover, the turnover in an agency arrangement would be the total commissions. Where the distributor is actually buying the goods off the company and reselling them, her total turnover would be the total of her sales. Let us forget the phase-out area and just talk about the $50,000 limit—one lady will start to phase out when her sales get to $50,000, which means her commission is about $10,000 or $12,000. The agent starts to phase out at $50,000, when her income is at $50,000.

Mr BRENDAN O'CONNOR—So it is discriminatory in that sense.

Mr Dell—It is discriminatory in that sense, in that you have got two people doing essentially the same thing, running the same operation, but getting a different tax benefit. I put a little work sheet with our submission and I did some income projections which showed that the buy-sell lady would get $230 tax offset and that the other lady would get about $2,600 tax offset, and some of that would be eaten up. Because it has got to be in the simplified tax system—and there are some other requirements there; it is not quite as simple as it sounds—some of that, we believe, would be eaten up with professional costs that they would need to incur. So in our submission to the government I think we expressed the view that it is a shame that it has become so complicated in what otherwise sounds like a very generous opportunity. It is a shame if it is going to be complicated to the point where some of the benefit disappears.

Mr HENRY—I think it is great that the Direct Selling Association have come along here today to represent their views. I guess it is an area in which, traditionally, we have not thought of commission salesmen as independent contractors, but clearly that is the case and it is spelt out fairly well here in your submission. I am just wondering about these people who are engaged or contracted as independent contractors. Is there included in those contractual arrangements a requirement for public liability insurance, personal accident insurance and things of that sort to pick up on those issues that may occur driving around from place to place?

Mr Dell—It would be unusual for that to be spelt out as a requirement. I think the question of insurance and protection comes in the training and the education of these people. Bear in mind, once people join an organisation, the great majority of them would then embark on an education process, on a learning curve. The question of insurance and workplace safety would come into—

Mr HENRY—So the Direct Selling Association provides that training?

Mr Dell—We do with our members, but we do not have any contact with the 640,000 distributors. Our contact is with the members. We do run a program called the DSAA business school. We run three of those a year, and we get prominent businesspeople to talk to our members. There is one next Tuesday, in fact, where we have a ex-commissioner for consumer affairs in New South Wales, a partner from Allens Arthur Robinson and a leadership training expert from Melbourne on the program, each of whom will have an hour to talk to our members. So we do have that program.

Mr VASTA—Would there be an orientation when they first join the organisation? Would that normally happen, say with Mary Kay?

Mr Dell—Most of our members have very comprehensive training and education programs, and the answer to that is yes, but of course the programs are all voluntary.

Ms HALL—Do they pay for them?

Mr Dell—No. Well, when I say no, I am not aware that anybody charges for them, but—

Mr VASTA—But they are there.

Mr Dell—There may be somebody that charges something, particularly if it happens in the field. Where one of these field managers organises her monthly or weekly meeting in a public hall, she may ask the people to contribute to the costs of the hall or the orange juice or whatever.

Ms HALL—So isn't the training provided more like an employer-employee relationship than one with somebody who is an independent contractor and who needs to buy that service?

Mr Dell—Except that it is voluntary. Not all of them submit to the training. They do not have to come.

Mr VASTA—But it is in their best interest.

Mr Dell—It is in their best interest to come. If they want to be successful, they should come to training.

Mr VASTA—And it is in the best interests of the company to make sure that they come so that they are protecting their investment as well.

Mr Dell—Correct. There is a big emphasis on the education of these independent salespeople. Bear in mind that 98 per cent of them earn less than the tax threshold each year.

Mr HENRY—So is it seen as a casual employment opportunity or casual contractual opportunity rather than—

Mr Dell—I would not even call it casual employment. What we tend to describe it as is income supplementation, which is more appropriate. If 98 per cent of them earn less than $6,000 in gross earnings, why do they do it? They do it because, in that 98 per cent, there is an enormous percentage of people who are making $20 or $30 a week, which is what they started off to do. That was their goal. It is not failure; it is success. There is an enormous number of those people who join for a specific purpose: to pay off the second mortgage, the car or curtains or to put kids through school. These are goal setters, who come into the industry and achieve their goal—and lots of them leave after that. The challenge for the companies like Mary Kay is to keep them in. Once they have achieved their goal, hopefully they will have become somewhat involved, to the point where they will want to stay. That is the challenge for companies.

Mr BAKER—Do you have any experience with labour hire agencies?

Mr Dell—No.

Mr BAKER—So people come from outside, direct contact to you, as independent contractors?

Mr Dell—I am not quite sure that I understand the question.

Mr BAKER—They contact you individually, not on a group basis.

Mr BRENDAN O'CONNOR—For recruitment.

Mr Dell—The labour hire people? I cannot remember having any contact with labour hire people who look to us to provide recruitment services for us. Maybe some of our members do it but I would find that unusual, because the recruiting happens out in the field. The companies do not do the recruiting. It is self-generating.

CHAIR—With the exception of paying for literature and perhaps, say, your start-up kit, does someone who joins one of your member organisations pay some sort of membership fee or up-front contribution?

Mr Dell—Most of our members—particularly those in the party plan area—would insist that, when people join, they get a demo kit. How can you run a show if you don't have any products? They are fully refundable and in there there are enormously beneficial mechanisms that have been developed. It is way below cost. They are generally not profit items. Yes, there is a cost for the demo kit. For those companies that are not in party plans, there is a general trend to charge people to come in. They are given something for it. They get a literature pack and some manuals and training materials. It is generally a figure of less than $100, I would guess. There is a further tendency—and it has happened in only the last five to 10 years—for companies to impose a renewal fee each year. It is generally a lesser amount than the joining fee. There is a renewal fee to stay on the mailing list, as they say, bearing in mind that the companies spend a fair bit of money servicing their 600-odd thousand independent distributors with monthly newsletters and literature.

CHAIR—Essentially the relationship that the sellers—the distributors or agents—have with the peak organisation, such as Mary Kay or Nutrimetics or Amway, is not unlike the relationship that a franchisee would have with a franchisor.

Mr Dell—In some respects, yes.

CHAIR—And they basically set up their own business?

Mr Dell—Correct.

CHAIR—But I am still confused as to why the Australian Taxation Office's 80-20 rule would not apply in this situation. They are getting their cheque at the end of the month from one organisation.

Mr Dell—Yes, but they also fit the other contractor provisions about supplying tools and fixing and rectifying. They take responsibility for the debts, they fix their own mistakes and they provide their own tools and equipment. It is on that basis that our people were exempted.

Mr HENRY—And they manage their day-to-day workload.

Mr Dell—Yes, they manage their own day-to-day workload.

CHAIR—I have a basic question about your organisation. What is the difference between a full member, a supplier member and a provisional member?

Mr Dell—Full members are those direct-selling organisations that have been operating for more than a year. You cannot just walk in and join the DSA; you have to go through a fairly exhaustive examination process, which I carry out personally. I examine the literature and operation. You have to be a provisional member for one year before you can become a full member.

CHAIR—But that does not stop me from establishing a direct-selling organisation, does it?

Mr Dell—No, it just gives us the opportunity for a year to follow your progress. Supplier members are people and organisations who are not in direct selling themselves but they supply good and services to our members. They are communications people and—

CHAIR—Your life member Graeme McDougall is not a former federal MP, is he?

Mr Dell—No.

Ms HALL—Have you ever refused to allow anyone to direct sell for you?

Mr Dell—Have we ever refused an application for membership?

Ms HALL—Yes.

Mr Dell—We have on two occasions.

Ms HALL—On what grounds?

Mr Dell—I would prefer not to mention the names of those companies, for obvious reasons.

Ms HALL—What about people who wish to sell, say, Mary Kay? Has anyone like that ever been knocked back? If so, for what reason?

Mr Dell—That question would be better answered by Mary Kay.

Ms HALL—Any company. I just pulled that out of the air.

Mr Dell—It would be unusual for companies like Mary Kay, Nutrimetics and Tupperware—the mass market consumable product type of companies—to refuse an application. It should be borne in mind that the application has been vetted before the signed contract gets to the company. That person has been recruited by an existing member. So, when the contract gets to the company, presumably the vetting has already been done.

CHAIR—Mr Dell, thank you very much for your time. We appreciate your making the time to be with us. Thank you for your submission and for your evidence.

[11.59 a.m.]

REICHMAN, Mr Peter, Treasurer, Courier and Taxi Truck Association

ROBERTSON, Ms Kathleen Patricia, Chief Executive Officer, Courier and Taxi Truck Association

TAYLOR, Mr James, President, Courier and Taxi Truck Association

CHAIR—I welcome the witnesses from the Courier and Taxi Truck Association. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We do prefer to hear evidence in public, but if you have issues that you would like to raise in private then we will consider your request at the time. Would you like to make an opening statement or add any remarks to your submission?

Ms Robertson—Yes, thank you. First of all, we do appreciate the opportunity to appear before you in this public arena to address an issue which we find extremely important particularly in the road transport industry because independent contractors in this industry, and indeed in this state, are treated, by virtue of legislation, very differently to those in any other industry or in any other state. Obviously honourable members would have read our submission and would see that we have, in particular, pointed out certain sections of the New South Wales act in relation to independent contractors. It has moved further afield with a superannuation contract determination which, in our view, flies in the face of a High Court decision in Vabu v the Commissioner of Taxation and with the definition of 'worker', which is a very hot topic at the moment. Whilst both the president and the treasurer operate independent businesses and can speak to you more directly on the workings of each of the companies, I am the bureaucrat of the association and certainly will be able to answer any questions that you have—we will be able to do that between us—in relation to our submission. Thank you.

CHAIR—Mr Reichman or Mr Taylor, would you like to make any comments?

Mr Reichman—No.

Mr Taylor—No, I am happy with that.

CHAIR—Yesterday we heard from the Transport Workers Union. It was a fairly substantive presentation and included some of their drivers giving evidence. Certainly they talked about contract determinations and their concern that they may be repealed or were not accessible in other states. Reading through your submission, am I reading it correctly when I say that you were party to contract determinations to begin with and then they were removed in 1984? It says:

An appeal saw the courier and taxi truck section removed.

Am I reading that correctly?

Ms Robertson—There are approximately eight contract determinations, which I am sure the union versed you on yesterday.

CHAIR—No, they did not actually; it just mentioned that it was concerned about contract determinations. That is what they said.

Ms Robertson—Contract determinations were introduced into the Arbitration Act 1940 back in 1979, after the incident with the Razorback blockade—in the heavy vehicle section of road transport. Since that time it has allowed for the making of determinations which are to be read as awards for what we say are clearly independent contractors. In 1984, the first general carriers determination was introduced to the commission and at that time the courier associations were told: 'There's no need to worry; we haven't involved couriers.' Unfortunately, on the day that that particular determination was made, it was quite evident that couriers had been re-placed in the document, and that led to an appeal before the full bench of the Industrial Relations Commission. Couriers were taken out of the general carriers contract determination.

Then the Transport Workers Union was going to organise a new courier and taxi truck contract determination. After about 12 months, the principal contractors and the independent contractors, who belonged to the same organisation, decided it might be better if they had charge of their own destiny, so they commenced to write a determination. It was lodged, and I had the carriage of that document to make the determination. It is the only determination that has been made by employing or principal contractors. We made that application because there was very much an expectation that something would happen. The membership of the association at the time was primarily independent contractors.

Since that time, the act has been changed on two occasions. On the last occasion, in 1996, it was very much strengthened by putting in applied provisions and the definition of applied provisions. So it is not that we have removed ourselves or have been removed but rather that we did not come back into the industrial relations arena until 1987, when the first courier and taxi truck contract determination was made.

CHAIR—What proportion of courier and taxi truck drivers would be considered employees as opposed to subcontractors?

Ms Robertson—I will call on my colleagues to answer from their perspective. From the association point of view, there would be one or two companies that we are aware of that may have a few employees. Predominantly they are independent contractors.

CHAIR—Independent contractors working for a lead organisation?

Mr Taylor—A principal; that is right. For instance, in my organisation, I have one employee driver.

CHAIR—Your organisation being?

Mr Taylor—Fleets Flyers Pty Ltd. We only have one employee driver, the balance of our fleet being 170 or 180 independent contractors. I would suggest that more than 95 per cent of the industry is independent contractors. There may be the odd business, such as a printing firm, that have their own employee drivers. I have no knowledge of what their numbers are.

Mr Reichman—In our organisation, we have offices in Sydney, Melbourne and Brisbane. Out of a fleet of about 230, we have three employees.

CHAIR—So you have presence in other states.

Mr Reichman—Correct.

CHAIR—In that regard, can you outline to me the difference in the application of the subcontractor definitions and the concerns of your drivers from one jurisdiction to another. I guess what you are saying, Ms Robertson, is that the contract determinations that we went through were essentially New South Wales only.

Ms Robertson—Correct.

CHAIR—Yet that would not have the same application in Victoria.

Mr Reichman—Correct.

CHAIR—Would you like to go through that for me, Peter?

Mr Reichman—In New South Wales, out of a fleet of, call it 115 independent contractors, three of them are employees. In a fleet of 70-odd in Victoria, they are all independent contractors and in a fleet of about 65-odd in Queensland, they are all independent contractors.

CHAIR—What about the whole issue of subcontracting? What is the difference in the way that they are viewed and in their treatment from one jurisdiction to another?

Mr Reichman—I stand to be corrected, but there is no contract determination in either Queensland or Victoria—that is, a subsection of the Transport Workers Union—which governs the way they have to be dealt with.

CHAIR—I understand that. I am trying to be very subtle here.

Mr BRENDAN O'CONNOR—Too subtle.

CHAIR—Are they hard done by? Are there real concerns about their viability, their ability to exist and make a living in Victoria and Queensland versus New South Wales because of different treatment? We heard stories yesterday from the TWU, who basically said, 'Our colleagues down in Victoria are doing it hard. There is no certainty and basically everyone is being driven down to the bottom dollar.'

Ms Robertson—Certainly where you have a regulated system, which we have in New South Wales, you are going to get some basis, some floor, if you like, in responsibilities and rights. One

would think that, in a regulated system, that would also extend to payment and treatment. That simply does not extend to any other state. I would feel some confidence in what the TWU would have said to you in relation to other states having no certainty or little certainty. But that does not detract at all from the fact that we are all operating as independent contractors. In fact in New South Wales, by virtue of the current courier and taxi truck contract determination and all of the others that happen to exist, ranging from interstate carriers to car carriers et cetera, we have a situation where the floor is only effective if it is honoured. Unfortunately, the determination is adhered to in its breach. This particular determination seeks to set a minimum rate, which by its very nature has become the maximum rate and has taken away the opportunity for these independent contractors to use their best efficiencies and to be able to get the best reward. In fact there is a plateauing and a deliberate plateauing of earnings for the principal contractors to stay in business.

Mr Taylor—I would like to address two things. You mentioned certainty. In this industry there is no certainty. We do not know from minute to minute, day to day, what the work flow is going to be. We can predict it based on what has happened historically: if today is a wet day, it will be a busy day. Can I tell you how many contractors will turn up for work today? I cannot. They will decide if they come to work and when they come to work. So there is no certainty in that respect. Sometimes we have to advise our clients we cannot perform the work they want us to perform because we do not have the resources to be able to do it. That may be because the work flow has increased or we do not have the contractors on the road to be able to perform because of the weather or whatever the reason might be—on the day after a long weekend, for instance, a lot of people take extra time off and that sort of thing.

On the other point that Kathy made, about the determination and it being a minimum: the true intention of the document was for it to be a minimum to protect independent contractors out in the field; the result has been the opposite and it has now become a maximum. People do not perform the same way. They have different skills and abilities and I think that is pretty widely recognised.

Ms HALL—Are you basically saying that that determination is not being honoured, that it is being undercut and that the whole industry is actually operating in an illegal way?

Ms Robertson—Without question.

Mr Taylor—I think there are certainly some elements that are—yes, definitely. I think it is actually a tad worse than that, because you have high performers and high achievers that earn large amounts of money, and then you have the people who do not have the skill, or as good an ability, and the result is that income is taken away from the high achievers to prop up the lower ones.

Ms HALL—What about safety issues?

CHAIR—What makes a high achiever? If you are contracting to move a parcel from point A to point B, there is a rate. What makes me a high achiever versus Mr Vasta here, who has got a much better car than I have? He has got the brand-new Falcon; I have got the old Toyota Hilux.

Mr Taylor—That is an excellent question. The perception is that it is a very simple industry—you pick from A and deliver to B—and that the people who do these things are simple people. I am sorry, that is not true. These people are highly skilled. They manage their work flows minute to minute and hour to hour. The work flow changes; it is never constant. The more efficient they are in getting around the metropolitan area the more money they can earn. They have to have the skill to load and unload vehicles correctly and efficiently. They have to deal with clients face to face and be able to handle them, so they have a customer service role as well.

Mr Reichman—They are multiskilled.

CHAIR—The dollar they get is similar to the dollar the other person is getting.

Mr Reichman—Not at all. As James was saying, day to day and minute to minute it changes. If a client decides to book a job where they want a high priority service from point A to point B, it has a serious impact.

Mr VASTA—They will pay a premium?

Mr Reichman—Very much so. You could have a job to go from here, for example, to Parramatta. Hypothetically, at the lowest it may pay $30 but at the highest rate they could pay the driver $75. If he has a $75 high value job to deliver but has three previous deliveries on board which are at a standard service, he has to rejig his routing to find the most efficient way to deliver that.

CHAIR—Let me go back to my original question abut the constant breaches of the contract determinations. From the evidence of yesterday, the drivers of Victoria, Queensland and everywhere outside New South Wales are really not in as dire a position as was portrayed to us yesterday.

Mr Reichman—No.

Mr Taylor—I suggest that the benefit that the contractors have in the other states is that they have an ability to negotiate. In New South Wales they do not have an ability to negotiate.

CHAIR—Do I really have an ability to negotiate with you?

Mr Taylor—Yes, certainly.

CHAIR—If I am a subcontractor working for you, what kind of power do I have?

Mr Taylor—In the current environment I would value a contractor more highly than a client. I can get clients without a problem; I cannot get contractors. If I were looking to purchase a business, for instance, I would not look at the client base, I would look at the contractors that come with it. That is what I would look at and value. This is the situation at this particular economic time—and it has been that way for a number of years. The economy has been strong and it is very, very difficult to get good, skilled people to work in this industry. We constantly refuse business because we do not have the ability to do it.

CHAIR—The other members are going to ask you questions in a minute but just take me through the process. I have knocked on your door because I have been retrenched from an organisation and I want to become courier driver. What do I need to do to become a courier driver? First of all, what do I need to bring with me? Secondly, what do I pay you, if anything, and what do you give me?

Mr Taylor—Firstly, the person does not pay anything at all. Secondly, we go through the person's background to find out what they have done previously and what experience they have had, if any. We usually then send them out into the field with an experienced driver because they need to understand what the industry is about. Most people who come into the industry do not understand, as I mentioned before, that it is like a continual game of chess. There are constant work flow changes. They think it is a simple job and when they get out into the field they realise: 'Hey, this is not for me; it is actually far more complex than I anticipated'—and they do not proceed. After they have been out in the field—I am talking about a person who had never been in the industry before—we bring them back into the office and we take them through some training about how to perform the work, the procedures and those sorts of things.

If they have a commercial vehicle we give them a trial period. Our fleet manager gets back to them and sees how they are going and what help we can provide and those sorts of things. It is quite an involved process. If they do not have a commercial vehicle we certainly do not recommend that they go out and commit to getting one straightaway because it is a large commitment and if they get three or four weeks into this industry and find out that it is not for them then they have a commitment that they are stuck with. This is peculiar to our business, but we have a number of vehicles that we own and will lease those to prospective new contractors for a number of weeks to see if they want to enter the industry. They then get a good feeling for how the industry actually works before they make a commitment to purchasing a commercial vehicle. However, that is just something peculiar to our organisation. I would not say it is standard practice.

CHAIR—How do I get paid?

Mr Taylor—You get paid an incentive based rate, so it is per contract of carriage. The rate of pay could be flag fall and kilometre based, piece based, weight based or time based. The other thing I should mention is that contract carriers do not do one thing at a time. They do what we call multiple hire, so they might have five, six or seven contracts of carriage on at any one time. The rates for each of those different consignments might be paid differently, so one might be on a pieces based rate, one might be weight and one might be flag fall and kilometre.

CHAIR—And I would get a cheque from you once a month?

Mr Taylor—We pay once a fortnight, in arrears.

CHAIR—Can I as a courier driver drive for more than one organisation?

Mr Taylor—Absolutely. We have no requirement that they have to contract only with us. They can contract with whomever they please.

Mr HENRY—So in that arrangement do they invoice you for the work they have done on a fortnightly basis, or do you keep a record and pay on the day?

Mr Taylor—Everything is electronic. As you can imagine, there is a very large number of transactions, and a lot of the transaction values are quite small, so it is all done electronically and we create a recipient generated tax invoice for each of the contractors.

Mr HENRY—You mentioned earlier that you both employ a number of independent contractors and some employees. Are those independent contractors eligible to belong to your association?

Ms Robertson—Yes, they are.

Mr HENRY—Are they also TWU members?

Ms Robertson—They are eligible under New South Wales law to become a member of the TWU if they so wish.

Mr HENRY—What about the difference in income between the independent contractors and those directly employed? How does that work?

Mr Reichman—In our organisation the employees are only used for a specific type of service. They get what I would call 'inferior service jobs'. We always give the higher paying jobs to the independent contractors because it gives them the ability to earn more money.

Mr BRENDAN O'CONNOR—Are they paid under an award?

Ms Robertson—Yes.

Mr Reichman—Just to go back to the chair's question in terms of how somebody has the ability to earn more or less money, in our Queensland and Victorian offices we are not seen to be the cheapest within the industry per se. It actually operates on what we call a percentage split with a driver. For instance, let us say that your organisation decides to sell a job in Queensland to go from the airport in Brisbane to the city in Brisbane. If you are successful enough to sell that job for $40, and you only have the ability to sell that job for $30, your contractor, who may be on a 70 per cent split, would get a bigger component of that $40. While the union may have expressed yesterday that the independent contractors in the other states are harder done by, I would not subscribe to that theory. As I said, we are not perceived to be the cheapest. We offer a good service in terms of additional aftermarket service, technology et cetera, and independent contractors like coming to work for our organisation because they have the ability to earn more money. So there are different companies paying different rates, and that rate depends on how well you can sell it within the marketplace.

CHAIR—Ms Robertson, on pages 4 and 5 of your submission you effectively identify that there are two types of independent contractor, and you clearly then delineate what a genuine independent contractor—the second option—is and you give a number of elements of their business structure, which I think is very useful. The first definition you give is of the, as you call it, Friday employee who becomes the Monday independent contractor. From my reading, that

would suggest that it was a bogus arrangement. Does that form of arrangement occur in your industry often?

Ms Robertson—No, it does not, because of the fact that there is a commercial outlay to buy the vehicle and to set up the business.

Mr BRENDAN O'CONNOR—But you have raised it. Are you concerned that that type of arrangement is prevalent in other industries?

Ms Robertson—Absolutely.

Mr BRENDAN O'CONNOR—And are you concerned that it would come into yours? Is that the reason for raising it?

Ms Robertson—It is not so much that it is coming to ours but rather that we believe there is an absolute urgency to have one definition of independent contractors, determined by the Commonwealth, with the man in the street understanding what that means without having to go through the court of appeals and higher courts to get the answer that they think. The reason we have raised that point is that there are people who really do have a master-servant relationship, and we believe that should be seen for what it is and they should have the representation, if they want, of the trade union movement. On the other hand, we believe that independent contractors who fall under the category that we have highlighted second should be covered by one set of rules, and we do not see that there is a need for having trade union membership for that area.

Mr BRENDAN O'CONNOR—Why is that, when employer bodies represent employers all the time? If there is a need for employers to have employer bodies represent the interests of employers in negotiations in judicial courts and industrial commissions, why would you suggest that independent contractors would not need on occasion, if they so wished, the capacity for a body to represent them? And why would they not be able to choose which body represents them?

Ms Robertson—That is a very good question. Indeed, we would not seek to take away from anybody the right to belong to, or not belong to, any organisation. What we are saying, in talking about employers and employees and looking at those two classifications of persons, is that employees should have the opportunity to be a member of a trade union. We say an independent contractor is not an employee, so why would you put them into employee representation? That is where you do get into regulation and that is where the waters are muddied.

CHAIR—It is still a choice issue though, isn't it?

Mr BRENDAN O'CONNOR—Yes.

Ms HALL—That is what I think.

CHAIR—It is still a choice issue for that individual.

Ms Robertson—It can be.

Mr BRENDAN O'CONNOR—It depends on the constitution of the organisation. In that second definition, which defines what you would see as a genuine independent contractor, you refer to five key elements. In other words, if you were looking at a definition, you would include those elements to define an independent contractor.

Ms Robertson—Yes.

Ms HALL—One of my concerns is occupational health and safety issues that surround your industry. I have been of the belief that the contract determinations set a level which enables independent contractors to maintain that safety. If you are telling us that there are people out there operating illegally—perhaps the majority of the industry—what sort of impact does this have on the safety of the industry and, as such, the safety of the community? There has been the Quinlan inquiry and there has been the House of Representatives inquiry, *Beyond the midnight oil*.

Ms Robertson—The first thing I would like to say about that is that the way the contract determination is at present and has been for the past five years there has been a minimum rate. It used to be only based on the initiative for each job—a flag fall and a kilometre rate which would compensate the independent contractor and allow that person to make sure that they could keep their vehicle in a roadworthy and sound condition.

Now that we have it based on this minimum rate, and therefore, as James mentioned, there is a bit of robbing Peter to pay Paul—you take work off the good operators and give it to those who are less efficient—we have a situation where we do not know whether those people who are kept on a minimum amount have enough money to answer your concerns about their occupational health and safety.

Ms HALL—Isn't that taken into account when that determination is made? My understanding is that it is.

Ms Robertson—That is a very interesting comment. The only determination which has an induction training section is the Courier and Taxi Truck Contract Determination. It is clause 16 of that determination, but it is still not, and never has been, operative. It has been in the determination as per a gazette of the New South Wales government since 1998, but it has not been put into practice in any way, shape or form. It calls for at least a four-hour induction by the principal contractor to the independent contractor, whether or not the independent contractor comes from a totally different industry or has been a courier with another company. It calls for them to learn the basics of what the contract determination has in it—the benefits and responsibilities. The induction training calls for them to have approximately an hour on occupational health and safety issues, which most of our members would say is simply not enough. But the fact is that that clause in the determination, which is directed to something as important as road safety—because it is broader than just OH&S; it is road safety and the motorist as well—is not in operation at all.

Ms HALL—On uniformity across the industry with the peak organisations, what sort of quality control is there on your members within the association?

Ms Robertson—We have a charter within the rules of the association. We have an opportunity to refuse, and do refuse, membership of the association if people are known to be avoiding the contract determination in the extreme. Some of those companies are well known. If you open the New South Wales *Daily Telegraph* every day you will find they are advertising for people. No, they are not growing very fast; they are turning over their contractors very quickly. But as for the road safety aspect, we would have a much better opportunity if, treated as independent contractors, they were then known to have the responsibility of learning about their own occupational health and safety obligations. It is simply not enough that four hours have not even been brought into play.

CHAIR—Thank you, Ms Robertson, for coming in and giving us evidence. It was good to hear another perspective on the issue in the industry. If there is any other information you want to share with us after you leave, please feel free to send it in to the secretariat. Thank you, Mr Taylor and Mr Reichman.

Proceedings suspended from 12.34 p.m. to 1.35 p.m.

COCHRANE, Mr Benjamin Robert William, Legal and Policy Officer, Australian Lawyers Alliance

MORRISON, Mr Simon Michael, Chair, National Workers Compensation Special Interest Group, Australian Lawyers Alliance

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I advise you that these hearings are formal proceedings of the parliament and, consequently, warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public, but if you have issues to raise and you would like to do so in private, we will consider your request. We have discussed your submission regarding the mention of some specific organisations. I will leave it up to you in terms of how comfortable you are going down that path. If you want us to go in camera, we are happy to do that if it is necessary to make the point. However, if it is possible to still get your message across without going down that path, we would prefer that.

Mr Morrison—I think we understand.

CHAIR—I now invite you to make an opening statement.

Mr Morrison—How much time do we have?

CHAIR—Until two o'clock. Just on that, we have found that some people take up their entire time on their opening comments and there is then no time left for questions.

Mr Morrison—I will keep it very brief. I will not speak to the submission itself—you have read it and it is self-explanatory. We take on board the issues in relation to the naming of particular organisations. We do not propose to go there today, unless you have questions for us.

At the risk of oversimplifying the subject matter of the inquiry, we see it as the tale of the rooster and the duck—with the rooster being the worker and the duck being the independent contractor—and the problems that emerge in that relationship. There appears to us to be two things that underpin what is driving the inquiry: matters pertaining to what I would call industrial relations issues and matters pertaining to workers compensation issues. As evidenced by our submission, we intend to draw on the workers compensation issues only. I am sure you have heard plenty from other organisations in relation to the IR components. That is the cornerstone of what we are talking about. I want to touch very briefly on Minister Andrews' press release and the discussion paper released yesterday.

CHAIR—You are further advanced than we are on that. We actually have not have a chance to read it yet.

Mr Morrison—I did intend making copies.

CHAIR—We have copies; we just have not had a chance to read it yet.

Mr Morrison—I will make some brief comments on that because of how those matters touch on this inquiry. In the press release, the minister says that the main areas of reform he seeks to address in his discussion paper are: firstly, protecting independent contracting arrangements, including 'Odco', as commercial arrangements and not employment arrangements; secondly, addressing inappropriate state and territory legislation which 'deems' independent contractors to be employees; and thirdly, ensuring that 'sham' arrangements are not legitimised. The tail of that is to prevent states and territories from impacting negatively.

Can I say from the outset that our submission is predicated on what we see as a clear distinction between genuine contracting arrangements and what we would perceive to be sham arrangements. Our interest is in ensuring that people who are truly workers are afforded the proper protections. We do not come to this place to make any attack on genuine contracting arrangements and we have some sympathy for the dilemma that is caused.

I will very briefly take you to a couple of points in the discussion paper. Firstly, at page 3, paragraph 7, the minister outlines a list of proposals. The one we are particularly interested in is the question of whether there are any state laws other than workplace relations laws, such as workers compensation provisions, which the Commonwealth should consider overriding. We have all been through the Productivity Commission's experiences of the last 18 months. As I understand it at least, that is not a live issue for current purposes, but it does impact in relation to labour hire arrangements, and we want to say a little bit about that. In particular, at page 5 of the discussion paper, it is suggested that addressing inappropriate state and territory legislation, drawing on deeming provisions, seems to be an issue of agitation in relation to the minister's paper.

I will very quickly take you to page 36 of the discussion paper—and this is really the essence of what the debate is about as we see it. It is certainly not in contention that it is a difficult exercise to, in a clinical sense, determine what is a true contracting arrangement and what is a true employment relationship. There have been lots of attempts over the years, through statutes and the common law, to work that out. The multifactor test, which is derived from the decision in Stevens and Brodribb, sets out the parameters. Our submission is that the common law ought to be preserved in relation to determining those issues. As difficult as that may have proved in the past, it is an important consideration because the circumstances, as you would appreciate, differ from claim to claim—and, despite the best efforts of legislatures around the country, one cannot codify that.

I will now move to page 19 of the discussion paper where it talks about the issue, which is stated very clearly by the minister, of whether there are any state laws other than workplace relations laws, such as workers compensation, that should be overridden. The discussion in relation to that issue, in our respectful submission, seems to concentrate more on the difficulties that might be presented in the IR platform, as opposed to the workers compensation platform. We accept for the moment that there is no national legislation governing workers compensation. Although the question is raised as to whether there is a distinction between the true nature of common law non-employment contracts and those raised in this paper, we point out that the way state legislation is drafted that is not so anymore. A good example is my home state of Queensland where one might satisfy the common law test for being a worker but, if one does not get through the gateways set out in the workers compensation legislation, one does not have

access to common law remedies. That was the case before 1 January 1996 but it was changed. So we make the observation that it is not as simple as suggesting that relationships are different.

That then takes us to the second paragraph on page 22 of the discussion paper and the provisions in relation to the sham arrangements, and the minister outlined what a sham transaction is. The comment is made that:

Sham arrangements can occur where hirers seek to cloak relationships to appear as independent contracting arrangements in order to avoid responsibility for some legal entitlements payable to employees.

That is the very essence of what we seek to protect in our organisation, and we urge the committee to carefully explore the issues in relation to what we would regard as sham arrangements, to ensure that these people are protected.

I will finish with the reference to deeming laws in the discussion paper because, as I said earlier, that seems to be a bit of a sensitive issue. At page 21 of the discussion paper there is a quote three-quarters of the way down the page. They are quoting from a working paper entitled 'The legal concept of work-related injury and disease', authored by Messrs Clayton, Johnstone and Sceats. The citation says April 2003. I believe the paper was actually dated 2002. The quote, which supports the suggestion that deeming provisions are not a good thing, states:

The deemed inclusion of a diverse range of workers, represents a potpourri of examples without any single defining principle, apart from some … notion that they represent socially desirable areas of coverage.

The document that they quoted from goes on to say something of real significance about the use of deeming provisions, and I am speaking to the working paper, dated April 2002, at page 19.

CHAIR—Are you referring to the original Clayton, Johnstone and Sceats paper?

Mr Morrison—That is so. It is in the same paragraph that is quoted in the discussion paper. It states:

In practice, they often represent the impact of political events over the years; for instance, the inclusion of share farmers in Victoria stems from the period when Victoria had a Country Party premier. The group of voluntary workers who are covered—particularly volunteer firefighters—is generally also testimony to political clout as one of the authors of this paper is aware of government resistance to the extension of this principle to other volunteer workers (for example, community visitors) whose work is arguably similarly socially meritorious.

The point we make is that the use of deeming provisions for political gain is a big no-no. What is critical here is that the deeming provisions are there for their real purpose: to protect people who should be protected in the scheme. I can speak to only my home state of Victoria, but that is the precise reason why deeming provisions occur, in my respectful submission.

I will quickly take you to one of the submissions made to the committee. It is submission No. 26 from Labour Force Australia Pty Ltd. It does not appear to be dated. It is authored by Mr Peter Bosa, who is the chairman of that organisation.

CHAIR—I do not think we have had a chance to go through that submission yet.

Mr Morrison—I will briefly speak to it. Mr Bosa makes a couple of interesting comments, some of which we support, I might add, and some of which we think require some clarification in the context of this inquiry. Unfortunately, the pages are not numbered, but it is the second page of the report, under the heading 'The need for consistency across jurisdictions'. Mr Bosa says, firstly:

The variations in the relevant pieces of state legislation, particularly Workers Compensation, cause unnecessary problems and additional administrative functions for Odco agencies which operate in different states.

With respect to Mr Bosa, that debate was had in Productivity Commission hearings. We are in agreement that, for the benefit of national employers, if there were some uniformity of legislation it would make life a whole lot easier. That does not mean changing people's substantive rights. It was agitated with Commissioners Woods and Johns in some detail that, if some effort was put into it administratively, results could be achieved to assist national employers. Sadly, that road was not explored through the Productivity Commission hearings. We simply make the point that Mr Bosa's remedy could easily be accommodated, should the parties turn their minds to it, without interfering with people's substantive rights, as he appears to suggest should occur. Mr Bosa goes on to talk specifically about WorkCover. He says:

Nationally, workcover is a joke. Every state and territory has different legislation, different interpretations, and different industry rates. In fact they are all so different one wonders if we are doing the same business in the same country.

I have some sympathy for his submission in the context of national employers. The reality is that the states have the power to legislate in relation to those matters. I suspect the reason why definitions of, for example, work or an injury change from time to time are directly correlated to the viability of the schemes as they exist. The definitions are either relaxed or tightened, depending on the state of the schemes.

This is not the place to have a debate about the financial viability of workers compensation schemes. It is, however, relevant if one of the outcomes sought—and it appears to be so in Minister Andrews' discussion paper—is an attempt to legislate in that area. As evidenced by the CPM version 6 data which was released this week by the minister, one scheme in the country—notably the Queensland scheme, which has concurrent statutory and common law access—continues to outperform all other schemes in the country. It currently enjoys a liquidity ratio of 146 per cent and climbing. In that context, we urge you to consider the consequences of a comment like that.

Finally, in the second last page of Mr Bosa's submission he talks about strategies to ensure the legitimacy of these labour hire arrangements. He makes the comment that the common law serves us well. We are in agreement with Mr Bosa about that. You heard me earlier say that we believe the common law should be the arbiter of that test. He said:

The Independent Contractor Act should clarify many areas. It must not be used as a means merely to cheapen Australian labour. Sham arrangements must be set aside and we must look to embrace the concept of economic benefit.

Interestingly enough, he goes on—and again we support his organisation in this respect—and says:

Simply, a contractor should not be disadvantaged economically vis a vis an employee. The totality of remuneration to a contractor should equal the value of payment to an employee and include a component to cover superannuation, as it is an economic benefit to an employee.

An obvious extension to that submission has to be the protection of one's rights. We concur with Mr Bosa that that is the outcome that should be achieved. That assumes a clear distinction between a genuine contracting arrangement and a sham arrangement. That is really the cornerstone of what we are getting at. He then goes on to say:

It must be made abundantly clear that a person who ordinarily at common law is an employee cannot become a contractor simply by signing a contract.

We will say a little bit about that in a second.

CHAIR—Are you almost done?

Mr Morrison—Yes.

CHAIR—We are almost done, too, unfortunately.

Mr Morrison—If I can finish very quickly, the upshot of this is that we recognise that across the two platforms I outlined, IR and workers compensation, there are some significant issues. Our view, very simply, is that the rights of true workers in the compensation environment seem to be overlooked in much of the discussion. The remedy that can be afforded is not a difficult one. What we do recognise is that, if there is a broad brush approach to this that might cloud issues in relation to industrial relations, then that is a different issue. If it came down to that issue, we would submit very heavily to you that at the very least in a workers compensation context the government ought not go down that road to interfere with rights, because it simply does not need to. There are remedies available to it.

I will finish very quickly with my reference to the rooster and the duck. That was a reference in the decision of Re Porter in 1989, taken from *34 Industrial Reports 179*. It talked about the very thing Mr Bosa alluded to in his submission, and that was attempting to call a worker something else. The quote from the court was:

The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck ...

We urge upon you that that important distinction be kept in mind.

CHAIR—Thank you very much. That was a very good perspective—particularly the discussion on the implications to workers compensation. I noted that a lot of your concerns were centred around the application of the definition in Tasmania specifically, although you also pointed out what takes place in Victoria. We have heard from a number of witnesses so far. Basically, all of them said that the common law test for what a contractor or a subcontractor is appears okay—particularly the indices that one applies—but that there is still quite a lot of grey area there. There still needs to be a lot more definition put around it. You are essentially saying that the common law is okay. But you are also concerned, using your terms, about the duck and

rooster application. In your opening comments you also referred to the fact that you cannot codify the definition. Is that really the case? Are we walking away from a position where perhaps we could provide greater certainty to it? We have heard witness after witness say: 'I do not care what we do so long as there is certainty. That is what our members want; that is what the people we work with want. They want certainty.' Unless your industry has been through the courts and had a test case, you do not really have that certainty.

Mr Morrison—No.

CHAIR—So is there a way of achieving that? You did talk about deemed employees and deemed employers. I had not heard about the distinction between the two before.

Mr Morrison—It is a concept which arose in the United States in the 1930s of joint employment. It is referred to in Minister Andrews' paper. It was enacted in that era to protect circumstances where, using the duck and the rooster analogy, there was that uncertainty in relation to what they were. So they put the employer hat on, using one example, both the labour hire agency and the host employer in order to overcome that problem. We think, purely in a workers compensation environment, there are solutions that are practical, but we accept that if it moved across to the IR platform then that would open up another can of worms which we do not propose to deal with today.

Mr BAKER—The last thing we want are these sham arrangements. They should be torpedoed. What are your proposals for moving forward? A form of licensing regime from a national perspective? Quality assurance monitoring just like any other industry? Surely that would determine whether a sham arrangement is operating or not operating by an audit et cetera. It is pretty basic business practice. Surely some of that would alleviate some of these things that are happening.

Mr Morrison—It should, in theory. I will speak about Tasmania—one of my Tasmanian colleagues prepared material to assist us in this. The experience in our organisation—and I might add that it is not limited to Tasmania; it is just that we gave an illustration of some states—is that cloak relationships exist all over the country where true workers are being cloaked as contractors, for want of a better term, and losing potential rights as a result of that. The answer is, yes, there should be a solution that should be able to distinguish between the two.

Mr BAKER—If there was a licensing system, whatever form it takes, put in place with audits every six or 12 months then surely that would bring to light any sham arrangements that were occurring.

Mr Morrison—I have not turned my mind to how one would structure that, but I think the answer is yes.

Mr BAKER—To me, it is a very simple solution. Obviously the other issue is workers compensation, which is a nightmare with every state having different rules and regulations. There would be lots of differing views on that.

Mr Morrison—We will not go there today.

Mr BAKER—No.

CHAIR—On the issue of workers compensation, it seems to me that that is where your biggest concern is in terms of any tightening up of the definitions that may affect the workers compensation regime. Is it not the case though that even if you use subcontractors or labour hire organisations you are not absolving yourself of responsibility to provide a safe workplace. By law you still have that joint responsibility. You are concerned more at the premium end, are you?

Mr Morrison—No, we are concerned at the coverage end as well—and on two fronts. The first is this: let us assume that we have a situation where someone who was once a worker and protected in a workers compensation scheme suddenly is not and is called something else. The options available to them include, firstly, a contractual one—to take out first party insurance. That has obviously limits, which are restricted within the confines of that policy, and is far less attractive, I would suggest with respect, than workers compensation coverage. The second option is their common law rights in relation to damages. Their common law rights will depend on two things: firstly, the head contractor having sufficient means to satisfy a judgment should that occur through the courts—and, sadly, in this environment we see plenty of evidence that that is not so—and, secondly, the hope that the head contractor was responsible enough to take out public liability insurance, which is not compulsory. Therein lies the core of the problem.

CHAIR—So could that be resolved by ensuring that any agreements between the host employer and the subcontractor labour hire organisation involve a contractual requirement to take out public liability insurance as well?

Mr Morrison—That is one solution.

CHAIR—As Manpower said to us today, as an organisation they are responsible enough to do a number of things—firstly, go in there and do a full safety audit and, secondly, rehabilitate any injured workers by finding them a job with either that host organisation or an alternative one. Could that also be covered by an agreement that takes place between the host and the subcontractor?

Mr Morrison—There are two remedies that we thought could exist at a practical level to this problem. The first is in relation to statutory coverage: that every worker have the benefit of deeming provisions to enable them to be protected and then have common law rights that may or may not exist. That depends on dual access in schemes, and there are only about two in the country that currently have it. The next issue is the requirement to have compulsory PL cover. We were rather more attracted to a legislative solution than a contractual one. In those states where, for example, common law access was not available in the workers compensation regime—and there are a number currently—a legislative requirement of any of these proposals would be that the head contractor must take out that coverage.

CHAIR—Then could federal legislation be imposed on those states where there are no common law rights?

Mr Morrison—I do not really want to go into constitutional arguments, Mr Chairman, but if one reads the Optus judgment in the Federal Court that would suggest to one that the

Commonwealth is getting more excited about having powers in those areas. But I cannot answer that question.

CHAIR—Yesterday we heard someone talking about us using the national affairs powers. Stuart, do you have any questions?

Mr HENRY—No, I do not. I think the submission is fairly clear. I am not sure how the deeming provisions can actually be nationally consistent in terms of employers and employees, given the proliferation of different legislation in each state. You have not actually addressed Western Australia in your submission, so in that context I am feeling left out!

Mr Morrison—The short answer is no, you cannot. While we have a structure whereby the states legislate on those issues, the answer is no. Ideally—and these were our submissions to the Productivity Commission—we should have a nationally consistent scheme. The tragedy is that we have some schemes that operate very well and have common law access and good statutory coverage and other schemes that are either going backwards at a rate of knots or are in recovery mode. Unless and until we can get all the schemes to one point where they could operate viably, I fear that is not a viable outcome.

CHAIR—What is the position of the states in addressing this issue in terms of ensuring that workers compensation responsibilities are not just simply abrogated to another party?

Mr Morrison—I will only speak on my state, Mr Chairman.

CHAIR—So you cannot give us a comparison across all of the states?

Mr Morrison —I cannot. I am a Queensland practitioner. I would have to do that on notice, Mr Chairman., through my colleagues.

CHAIR—If you could, that would be fantastic, otherwise it would be very hard for us to get information on this.

Mr Morrison—We would be happy to do that. I can give you now an example from my home state that might assist you as to the point that you are getting at.

CHAIR—That would help us in terms of what kind of response we can make: whether we should be recommending a Commonwealth response or simply making a recommendation that the states take up a legislative response.

Mr Morrison—Take the example of a labour hire worker who is employed in Queensland by a labour hire agency which is a deemed employer pursuant to our legislation. Say he suffers an injury at the host employer's site and he is seeking damages to recover his loss. He will recover his statutory benefits from the WorkCover authority but he must proceed against the third party as well. The frustration for the WorkCover authority is the delay and cost in having two sets of litigation for one outcome. That is not acceptable to any of the stakeholders. We believe our first submission about that would solve that problem.

Ms HALL—You have pretty much answered what I was going to raise. The bottom line, as far as you guys are concerned, is your concern that all these changes will circumvent the laws that give your clients and workers protection under workers compensation. You think that needs to be resisted at all levels to maximise the amount of protection that workers have and you see that the changes that are taking place are really dissipating their support.

Mr Morrison—We say two things about that. Yes, we are concerned—

CHAIR—It is more than that; you are saying existing laws are failing as well.

Mr Morrison—That is right. Our core constituency dictates that we be concerned about that.

Ms HALL—Some of those would have happened with recent legislative changes at the state level too.

Mr Morrison—They have attempted to but have not really succeeded. The second thing we say is that we do not think it is necessary for the Commonwealth to go down the workers compensation road.

Ms HALL—Yes, I heard you.

Mr Morrison—The flavour, rightly or wrongly, that I draw from Minister Andrews' discussion paper is that this is predominantly an IR debate. As I said, that is not an area we are going near today.

CHAIR—Are you happy for us to have that IR debate?

Mr Morrison—With the appropriate people.

CHAIR—Thank you. We are out of time. I do not want to burden you with extra work—you have got a business to run and jobs to do—but if you are able to provide us with any other information on the comparative analysis across the states, that would be fantastic.

Mr Morrison—We would be happy to do that. When would you like that material in by?

CHAIR—Any time between now and the end of May.

[2.07 p.m.]

WHIPP, Mr Simon James, National Director, Media Entertainment and Arts Alliance

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I would like to advise you that these hearings are formal proceedings of the parliament. Consequently, they warrant the same respect as proceedings of the House itself. I remind you that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We would prefer to hear evidence in public, but if you have issues you would like to raise in private, we will consider your request at the time. Would you like to make some brief opening remarks?

Mr Whipp—I would. Our submission is brief and I will briefly run through the concerns that we have in this area. My oral submission will focus on performers as that is the area where I have some level of expertise. Performers in Australia work in a variety of areas—film production, television production, theatre production, corporate work, work for government, advertising—and normally it is of a short duration. A long term of engagement for a performer would be 12 weeks on a feature film. An exceedingly long engagement might be one year on a long-running commercial theatre production, but normally a performance engagement would characteristically be less than one week.

There were a number of what one might consider to be inappropriate practices which existed prior to the introduction of the new taxation system in 2000 in relation to the payment of performers. Many of these were exposed by the new tax system, principally in the advertising area and in the government area. After the introduction of the new taxation system in 2000, the advertising area became a particular concern. Advertisers were seeking to classify performers, in all cases, as independent contractors. I heard your earlier comments, Chair, about the benefits of having a decision in relation to your industry. The fact that we do have a decision in relation to our industry—a High Court decision in the case of Zuijs v Wirth Brothers, which is a long-standing decision in relation to the engagement of performers—should provide the certainty we require. Nevertheless, there are ongoing disputes between us and the performers and the engagers of performers in relation to their services.

I will provide some facts about that case, which indicate that it really is a watershed in terms of the type of engagement a performer might be required to undergo. That case was about a group of performers who came with their own trapeze group and choreographed routine to a circus. They provided themselves as a group of choreographed trapeze artists to a circus. The High Court, in that instant, said that they were employees of the circus. The vast majority of engagements of performers have nowhere near that level of control in the hands of the performer. The vast majority of engagements of performers are to a script provided by a producer—including in the case of advertising—and are performed in accordance with the directions of a director. That also applies in relation to government work—and when I talk about government, I am not particularly referring to any level of government; this is government at every level where this is an issue and government argues that it is not the employer of performers.

Prior to the introduction of the new taxation system, there was a provision in the previous taxation legislation which mirrored, to some extent, the deeming provisions in the Superannuation Guarantee (Administration) Act, which we have copied in our submission. That was not reflected in the new taxation legislation after 2000. To a great extent, that provision was not complied with, and often performers were paid without the deduction of tax, which was obviously an unfortunate position both for the performer at time of tax and for the engager. Often, I suspect, some of that income went undeclared as well.

After the change of tax laws, as I indicated, we expressed concern about this to the tax office. There was a change to the legislation, which applies to advertising only. Advertising agencies and engagers of performers for promotional services are required to deduct tax at point of engagement so that it is a deemed transaction for the purpose of the legislation. One noted radio network at that time then required every performer who they engaged to provide services through a lender company provided to set them up as a company and provide their services through that company. Performers expressed extreme concern about that and, fortunately, the network agreed to back down in relation to that position. Some performers do provide their services through lender companies now and some continue to provide them as PAYG.

There are areas of remaining difficulty for performers. As I have indicated, they are government, at all levels, and corporate. Those engagers require people who are, in our view, employees to either provide Australian business numbers or to have 48½ per cent deducted for ABN withholding. The difficulty, as we see it, particularly in relation to performers, is that a performer's average income per year is $10,500—and the vast majority of that is provided in normal employer-employee relationships—and so it seems ludicrous to ask that performers should be required to go to the expense and difficulty of constructing an arrangement which is, in the vast majority of cases, such a small amount of income.

That is why our position is that it would be preferable for performers, for the purposes of all of these laws, if these deeming provisions were to apply, to make it clear that these arguments should not be had. As we say, it is not as though the decision is not clear: the High Court has made its position clear on the issue of performers. It just does not seem to be something that is accepted by a number of engagers of performers.

CHAIR—You also talk about how the whole landscape has changed dramatically since the advent of the GST and ABNs. Could you explain to me what kind of effect that has had. Why has there been a proliferation of ABNs being taken up?

Mr Whipp—It is because of the issue of engagers saying, 'We will not engage you as an employee; we will only engage you if you provide an ABN.' As we have said, our view is that the true nature of the relationship is that it is an employer-employee relationship, but it is one of those areas where, in our view, shams are being created where the employer is unwilling to take on the obligations they should truly be taking on—for example, the obligation to pay superannuation and the obligation to pay payroll tax.

Mr BRENDAN O'CONNOR—So your members are effectively being asked to call themselves independent contractors if they want to get any work.

Mr Whipp—That is right. There are obvious ramifications for the Commonwealth in this. If the engager is not undertaking all their responsibilities as an employer then there are possible repercussions. For example, if there is no workers compensation insurance taken out then, if injured, they will fall back on the disability pension. If there is no superannuation provided then, at 65, they will require the age pension.

CHAIR—That is a consequence of what they are doing.

Mr Whipp—Yes.

CHAIR—This question covers partly what Brendan is raising. What is the motivation behind asking them to take on an ABN?

Mr Whipp—My view is that it is an administrative ease motivation.

CHAIR—So it is all for administration, not for reduction of costs.

Mr Whipp—I think that is probably right; it is an administrative ease motivation. They say, 'We are only engaging these people for one day and there is too much administration for us to do it.' The difficulty is, as we see it, 'This is the business in which you are—

CHAIR—So they are running their organisations pretty lean to begin with?

Mr Whipp—No, they are not. We are talking about national radio stations which have significant profits each year. We are talking about government. We are not talking about businesses which are lean.

CHAIR—What type of person would a large commercial city radio station be—

Mr Whipp—A voice-over artist for advertising. They will seek to get advertising work from potential clients and then they will get a voice-over artist in to provide a voice-over for the advertising. That engagement may be one hour but it nevertheless is an engagement where the person is told where to turn up, what to read, how fast to read it and the way in which it is required to be read.

CHAIR—But the regular on-air person, such as a talkback jock, would be on contract as well?

Mr Whipp—They may well be either on a lender contract—that is through a loan-out company, and I suspect that is the nature of the engagement of someone like Alan Jones—or as an employee. That is correct; yes.

Ms HALL—So issues such as workers compensation would be real issues for members of your organisation.

Mr Whipp—They are, and we have made the point in our submission that workers compensation laws, in our view, provide inadequate protection. They provide some protection but it is inadequate protection—particularly when our members travel from one state to another,

because the laws do not protect workers travelling from one state to another and the laws vary from one state to another.

Ms HALL—So you are basically saying that you represent members that are working in a very volatile industry—one that lacks security—and that this has been further exacerbated by recent changes.

Mr Whipp—That is certainly true. They are also very vulnerable because it is a well-known statistic that, on any one day, 95 per cent of performers will be unemployed. That is a structural thing. It is not something that is characteristic of only the Australian entertainment industry. Producers require a large number of unemployed performers to be available at short notice to provide services. In the case of the advertising voice-over, for example, the performer may be called only on the day of employment to provide the service to the employer. These types of things are required as a way in which the industry operates.

CHAIR—The reality is: can the radio station have that person as an employee if they are using them only for specific jobs which may be periodic?

Mr Whipp—We would say that the person is an employee. It is not a choice. It comes back to what the High Court has said and what the position of the common law is.

CHAIR—But they would have to be treated as a casual employee.

Mr Whipp—That is correct; they are a casual employee.

CHAIR—So you are okay about them being treated as a casual employee.

Mr Whipp—We have no difficulty with that. That is what they are.

CHAIR—It is a subcontracting relationship that—

Mr Whipp—That is correct. We do not argue that they are anything other than a casual employee, and they should be afforded all of the protections that any other employee is afforded.

CHAIR—In terms of the industry itself, is there any particular component of the Media Entertainment and Arts Alliance which is more prone than others to engaging in these arrangements?

Mr Whipp—Performers.

Mr BRENDAN O'CONNOR—As opposed to journalists.

Mr Whipp—Yes. Performers.

CHAIR—What about the backroom boys setting up for a movie set?

Ms HALL—Labour hire.

Mr Whipp—No. Normally most of them are engaged as employees and there is no issue with that. As I indicated at the start, in most of the areas where there is any lengthy duration of employment there is no issue about the status. Sometimes in film production the members of the crew will also provide equipment, but usually the nature of the engagement is that they will provide their services as employees and they will provide their equipment, if they are providing equipment, through a company. There will be two separate contracts: one which relates to the provision of services, the labour, and one which relates to the provision of equipment.

CHAIR—If I were a lighting specialist, would I be working directly for the production company?

Mr Whipp—Yes.

CHAIR—As an employee?

Mr Whipp—That is correct.

Ms HALL—They use labour hire too, don't they?

Mr Whipp—In the case of live theatre production—for example, a Bette Midler concert—there will be labour hire arrangements, yes. That is a short-term engagement and there are often labour hire arrangements.

Mr HENRY—Given the expanse of representation that you have, do all the talent who go out into the marketplace want to be considered as employees? You mentioned voice-over work before. A lot of that is on a contract basis and it seems to me that a lot of those people like to work on that sort of basis because it gives them the flexibility they are looking for rather than being called or deemed an employee.

Mr Whipp—I do not agree with you that a lot of it is on a contract basis. I am not aware of the areas you might be referring to. If you could indicate those areas where you believe—

Mr HENRY—I gave voice-over as an example. It could be an actor, for example. There is a different complexity in some of these relationships with respect to your membership because of an agent acting as an intermediary in marketing the services of that particular individual to a client. That in itself demonstrates a different sort of relationship from an employment relationship.

Mr Whipp—No. We would say that it is still a normal employment relationship. It is a characteristic internationally that the agent is there to conduct the negotiation which an employee would normally conduct on their own behalf.

Mr HENRY—But that agent may also be part of the contractual relationship between—

Mr Whipp—No, it is never a party—

Mr BRENDAN O'CONNOR—In the relationship between the agent and the performer, say, the performer is the principal.

Mr Whipp—That is correct.

Mr BRENDAN O'CONNOR—That is their relationship. The relationship, then, between the performer and the potential employer is an employment relationship.

Mr Whipp—That is correct.

Mr BRENDAN O'CONNOR—There is no relationship between the prospective employer and the agent, is there?

Mr Whipp—There is no relationship between the prospective employer and the agent, no. In fact, all of the contracts which performers enter into allow the performer to tell the producer or engager where they want the money sent. There is no requirement that the money be sent to the agent. That is a separate arrangement—an agency-principal relationship between the performer and the agent.

Mr HENRY—Does that happen on occasions, though, where the agent actually receives the fee?

Mr Whipp—It is the norm that the agent receives the fee.

Mr BRENDAN O'CONNOR—On behalf of the performer.

Mr Whipp—On behalf of the performer. That is correct.

CHAIR—You are the only witness so far who has said that there is a simple approach to determining the legitimacy of independent contracts—that is, by using the superannuation guarantee definitions of contract of services or contract for services. It is as simple as that, is it?

Mr Whipp—I can only speak for our membership. As far as our membership is concerned, that would resolve the situation.

Mr VASTA—How big is your membership?

Mr Whipp—Our membership is 22,000.

Mr BAKER—Ninety-five per cent on any given day is unemployed.

Mr Whipp—I should say that that covers journalists, performers and crew. In terms of performers, our membership is roughly 8,000.

CHAIR—Mr Whipp, thank you very much for your submission and for coming forward. We appreciate the time you have given to present your evidence.

[2.28 p.m.]

CAMERON, Mr Doug, National Secretary, Australian Manufacturing Workers Union

CONROY, Mr Pat, National Research Officer, Australian Manufacturing Workers Union

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee does prefer to hear evidence in public, but if you have issues that you would like to raise in private then we will consider your request at the time. I invite you to make an opening statement.

Mr Cameron—Thank you very much for the opportunity to make a verbal submission. As you see, the union's written submission deals with the four terms in a comprehensive manner. We make 17 specific recommendations to the committee, which are detailed between pages 79 and 86 in chapter 8 of our submission. These recommendations arise from our research, our practical experience and consultation with members in a range of manufacturing sectors.

The Business Council of Australia—and I do not normally quote the Business Council—in its 2004 analysis of short-termism in Australia reported on research amongst Australians CEOs which demonstrated an increasingly myopic focus in decision making. Short-termism characterises Australian capitalism. Manifestations of this myopia include the skills shortage, the $90-billion infrastructure gap, the current account deficit, the household debt explosion and the housing bubble. Nowhere is short-termism more apparent than in the growth of the labour hire and contracting industries. The growth of outsourcing has been driven by short-term competitive advantages to the disadvantage of workers and the long-term sustainability of the Australian community.

Our analysis demonstrates that workers and the nation are disadvantaged in four key areas: (1) the impact on Commonwealth revenue, (2) the impact on workers' wages and conditions, (3) the impact on occupational health and safety, and (4) the impact on skill formation. If this committee fails to promote contracting and labour hire arrangements with appropriate checks and balances and appropriate regulation, it will further disadvantage PAYE taxpayers and increase pressure for reduced wages and conditions for permanent employees in manufacturing and other industries; it will expose permanent, labour hire and contracting workers to unsafe work practices and conditions; it will exacerbate the shortage of skills in a range of trades and callings across Australia; and it will increase the undermining of the taxation base due to the wrongful classification of workers as independent contractors where they are really dependent contractors or employees. Our estimate of the risks to the tax base is $14.38 billion per annum. With the money at risk, we could build a Snowy Mountains scheme each year or rebuild 28 of our major hospitals. This committee has an obligation to address these key issues in its deliberations. Failure to give due consideration to these issues of national importance can only mean that the committee has succumbed to the same myopia identified by the Business Council of Australia. I am confident you will not do that.

The AMWU believes that the community should adopt the minimum requirement of the ILO national policy on outsourcing. The ILO's Committee of Experts agreed that national policy must include providing workers and employers with clear guidance concerning employment relationships—in particular, the distinction between dependent workers and self-employed persons—providing effective, appropriate protection for workers; and combating disguised employment, which has the effect of depriving dependent workers of proper legal protection. The porous legal boundary between employees and nonemployees has assisted the trend to casualisation by providing a method that allows firms to reduce the number of directly employed workers and utilise a pool of contract workers by way of labour hire and subcontracting arrangements. It is the AMWU's submission that this porous legal boundary must be solidified. In this context, the AMWU supports the definition proposed by Professor Andrew Stewart to the building and construction industry royal commission. That is on page 75 of our submission.

On wages and conditions, we are of the view that reducing costs, and particularly labour costs, is the main motivation for outsourcing. This has been confirmed by an Australian Business Ltd survey, referred to on page 20 of our submission, where it is quite clear it is about costs in terms of outsourcing. Our submission provides some real-life case studies that refute the argument that outsourcing produces higher incomes for workers. On the contrary, the case studies clearly indicate that the transferring of the risk from employers to, initially, labour hire companies and then labour hire companies transferring the risk to individuals means that the most vulnerable individuals in society are the ones who are bearing the risk.

Harsh and unreasonable contracts between labour hire companies and employees are common in our industry. People who work for a labour hire company—and these are tradespeople, mainly, and some production workers—are now being forced to sign a contract to say that they will not seek employment with the host company for a period of 12 months or up to two years. That is an absolute nonsense. It is a breach of freedom to engage in your trade.

Mr VASTA—Why are they doing that?

CHAIR—Just let him finish. Please keep going.

Mr Cameron—Workers who earn lower levels of income from tenure-spasmodic income are being asked to bear the burden. Regulation of the contract industry should be a national priority, in our view. On health and safety, our submission details case studies where workers are exposed to work conditions without appropriate health and safety training. These case studies show ordinary Australian workers being disadvantaged due to their desire for a safe and healthy workplace. If they complain about an issue, they are then told, 'Don't come back.'

Independent Australian and international studies have demonstrated a link between job insecurity and contingent work arrangements and adverse occupational health and safety outcomes. In many cases, the treatment and rehabilitation of injured labour hire workers falls on the state, through Medicare and the social security system. The AMWU has discovered a number of cases of fraud in the industry. These go to incorrect classification of employees' work so that a lower workers compensation premium is paid, incorrect numbers of employees being insured, interstate companies not paying insurance premiums to the relevant jurisdiction and employees being pressured to take other types of leave instead of making claims for workers compensation.

I will move briefly to the impact on skill formation, which has been given a lot of air time over the last period. We believe one of the great untold stories in Australia is the diminution of training through outsourcing and the use of contract labour and labour hire companies. We have had a study done by a Dr Phil Toner, and that is in our submission. He is from the University of Western Sydney and is an acknowledged leading authority on this issue. Contrary to the assertions made in the independent contracting and the labour hire industry, the skills in the industry are diminished. Skill formation is adversely affected due to the lack of a coherent skill formation practice in the labour hire and contracting industry. I do not think anyone, from the employers or anywhere, could have come here and told you that there is a coherent skill formation policy, either for individual contractors or for the labour hire industry. As they are a growing part of the economy, that means you are always going to run into problems with skills.

A recent construction industry study by the Construction Industry Training Board and the Department for Education and Skills in the UK found that contractors were substituted for training, that contractors received less on- and off-the-job training than employees and that increased reliance on self-employed contractors is not sustainable. This study highlights the internal contradiction of labour hire—that is, firms are highly reliant on self-employed contractors with trade qualifications, but the training was received when the contractors were employees.

On the impact on the Commonwealth revenue, in a study by the National Institute of Economic and Industry Research for the union, NIEIR concluded that growth in contracting is leading to a $14.38 billion per annum risk to the tax base. Most independent contractors are in fact dependent contractors or employees. The loss in the tax base is a mixture of tax evasion and tax avoidance, including the failure to report substantial amounts of income, claims for fictional or improper deductions and the ability to split income with families and relatives and lower the average tax rate. As you see in our submission, sole traders claim that 8.96 per cent of their business income is spent on motor vehicle expenses, in contrast to the average construction company who claim 2.84 per cent.

Partnerships in the manufacturing industry claim on average 66.21 per cent of their income as ‘other expenses’ compared to a manufacturing company standard of 48.74 per cent. In the finance and insurance industries, sole traders claim 2.04 per cent of their income as payments to related entities. This is likely to be income splitting so that the tax base is reduced by half.

We have put forward a number of recommendations on these issues. The 17 recommendations in our submission provide appropriate regulation and accountability for the labour hire and contracting industries. I would be happy to answer questions on our submission and the recommendations contained in it.

CHAIR—Thank you for your opening statement. Mr Conroy, do you want to make a statement?

Mr Conroy—No, thank you.

CHAIR—I have a number of questions, but I want to go to the issues you mentioned about the impact of independent contractors and four other impacts: Commonwealth revenue, wages, workers compensation and skill formation—all of which we could talk about at length. On

wages, you are saying that the main motivation behind a lot of these organisations is to reduce their liability whether it be in terms of paying the appropriate wages, WorkCover premiums or superannuation et cetera. I noticed that the study by John Buchanan was done in 1988. Has anything changed since that time to make you feel that the big players at least are not doing that?

Mr Cameron—No, nothing. In fact, if you look at some of the submissions in the public arena from employers on the government's proposed changes to industrial legislation, you will see that the main driver for those submissions from some of the business groups is to increase flexibility—to have more capacity to contract out, to have more capacity to casualise and to have more capacity to shift the responsibility of running their business to second and third parties.

CHAIR—Yet we have heard from a number of people in the last two days that one of the principal motivations to engage labour hire companies or subcontractors is not cost but easier administration and perhaps greater flexibility. At the end of the day, they are also paying a premium for that service, particularly to the major labour hire companies such as Skilled Engineering, Drake or Manpower. They say to us that they provide the appropriate rates and conditions, plus a margin. For an employer to use them, they have to pay a premium, so there must be some other reason that they are using the labour hire companies as a source.

Mr Cameron—It is about cost-cutting. Australian Business Ltd have done a most comprehensive survey recently and they clearly indicate that it is about cost. Our submission identifies that survey; it is about cost. If people are coming here and telling you something else, they are being disingenuous.

CHAIR—An interesting piece of evidence that we heard this morning—and I noticed that Jill picked up on it—was that perhaps a lot of the Australian companies, particularly the multinational ones, were doing this as a way of hiding their true headcount from the parent company. Is that a serious concern?

Mr Cameron—It is a serious concern, and it is not being done by just multinational companies. Major Australian companies announce publicly significant headcount reductions—'sackings', if you use the colloquialism; they sack people—and the next day you will see the share price going up. It is partly due to the myopia, which the Business Council have identified; it is about short-termism. When you reduce the headcount, you get a kick in your share price, and if the CEO is retiring in the next six months that is reflected in his golden parachute. These are significant issues that the committee should be aware of when people tell you that it is about anything else.

We also see many of the people who are made redundant coming back as self-employed contractors with no security, no annual leave and no entitlements. It is really just a complete shift in the relationship.

CHAIR—I know it is outside your particular area of expertise, but you may have a comment to make on it: is there an ASIC response that we can recommend in that regard?

Mr Cameron—The bulk of our submission is that this is really an issue of the definition of contractor and employee. We believe that, if you deal with that, that is where it should be. I noticed this morning that the discussion paper from the minister basically says that there should

be different types of definition. You are defined differently if you are in the industrial relations field than if you are in the taxation field. We cannot see any logic or intellectual soundness in that argument, so we think there should be a common definition that applies for taxation and for the employment relationship. It should be a standard definition, and the definition we propose is the definition by Professor Stewart, which is in our submission.

CHAIR—Recommendation 3 is about establishing a licensing scheme for labour hire agencies. That has also been recommended to us by a number of others. One of the big players that we have heard from already says that there is no need for such a licensing scheme, because it is by self-regulation, and their own code of practice tends to cover that. That might be very much a self-serving view. Would that be a Commonwealth regulation and perhaps an accreditation and licensing that takes place?

Mr Cameron—Given that we are now moving rapidly to a unitary system, I would say yes. For a labour hire company to come here and say there should be no regulation of the industry and it is all too hard is a bit like Dracula saying, 'Get rid of the wooden stakes.' They are the perpetrators of these problems, and they would always say, 'We are making a profit from it; don't change things.'

CHAIR—Skill formation is a very pertinent point that you are making. We have not heard from Skilled Engineering yet—they are a major labour hire company. Do they engage in significant training for their subcontractors, their employees?

Mr Cameron—No, they do not engage in significant training, and if they come here and tell you they do it is the best-kept secret in the manufacturing industry. We are not aware of any significant training that they do.

CHAIR—Do you have agreements with Skilled Engineering and various organisations?

Mr Cameron—No, we have agreements with the host companies, mainly. These arrangements seek to regulate some of the worst aspects of the misuse of contract labour and labour hire, but I see that some of the proposals from the federal government and the IR agenda from Minister Andrews are to prohibit bringing some kind of sanity to the use of contract labour and labour hire. So you have a few conundrums there that you have to deal with in terms of the stated objective of the minister.

Mr BRENDAN O'CONNOR—A number of witnesses today and yesterday effectively made reference to your metalworkers award and the clause that I think has now been inserted for some years which allows casual employees, after six months, to elect to become a permanent employee. A number of comments were about the fact that there had been very few elections to do so, and the reason given by a number of witnesses was that people do not want to be permanent employees. Could you proffer a different perspective from the ones already given to us?

Mr Cameron—We have had many companies say privately to workers that if they seek to move to permanent employment they will terminate them. A huge stick is being wielded against casual workers not to use that clause. We will take whatever action we need to take to give

workers access to that. There is a great deal of fear and intimidation of casual workers that if they elect to move to permanent employment the employer will terminate.

Mr BRENDAN O'CONNOR—Have those members gone before a court or a commission or is it the case that they are so fearful of losing their employment that they will not pursue the matter?

Mr Cameron—Some would pursue the matter. In other areas we do pursue the matter and we do achieve permanent employment. This is a fairly recent award provision and we have got to make sure that we police this award provision effectively in our industry. We are taking steps to do that.

Mr BRENDAN O'CONNOR—Do employers in fact promote that clause? There would be employers who would not be aware of that particular clause.

Mr Cameron—Employers will not promote too many award clauses anyway.

CHAIR—Doug, I am not asking you to answer this question now because Hansard is operating. For our benefit, after this meeting would you send us not necessarily a submission but certainly some idea of the prime organisations who are doing this? We will treat it as confidential.

Mr Cameron—Okay.

CHAIR—We are very conscious of the fact that we have not yet heard from employers who are using labour hire firms and subcontractors. If you are saying there are a number of organisations who are rogues or are putting this kind of pressure on, we would like to know who they are, but we would prefer that information to be given to us outside this meeting.

Mr Cameron—We have put on the public record a number of examples of workers being intimidated by labour hire companies when they have taken steps to try to ensure safe and healthy workplaces. As well we have put in this submission examples where workers who have stood up for general rights on the job have not been re-employed. This type of behaviour is endemic in the industry.

Ms HALL—Further to what Brendan is saying about this, employer groups and labour hire companies have rolled out the fact that there has been a survey that was conducted of 600 workers, which has been backing up what Brendan said in that all of these workers would prefer to stay on working. Sorry, what was that survey on?

CHAIR—Let me assist. I will be very specific, and it is in *Hansard*. Manpower said this morning that they have an agreement whereby some of their people can go on to be permanent and, of the 600 or 700 eligible to do that, in four years they have had about two or three do so.

Ms HALL—That is not what I was referring to. I was referring to another survey that has been quoted.

Mr BRENDAN O'CONNOR—It was an RMIT survey which effectively said that over 65 per cent of casuals want to be permanent, which contradicted some employer evidence.

Mr Cameron—That is not our experience. Our experience is that most workers want some permanency.

Mr BRENDAN O'CONNOR—That is what I am saying.

Mr Cameron—Most workers want access to annual leave, they want access to sick leave and they want some stability in their life, and contracting out and labour hire diminishes that.

Mr BRENDAN O'CONNOR—Chair, can I ask my last question in relation to this matter?

CHAIR—Yes, but keep it short otherwise we will go over time.

Mr BRENDAN O'CONNOR—Yes, I will. I think it is a very critical point given there has been so much evidence to the contrary. As well as the fear of asking to convert—because they may not be employed the next day—is there also a concern amongst employees about loss of income in the first instance? In other words, I am thinking more of low-income employees having to lose a loading. Whilst they would love their entitlements, if they are on low pay they would be concerned that they could not afford to lose the loading. Is that an issue or not much of an issue for your members?

Mr Cameron—It is not so much an issue for our members. There might be an element of that but it is not the main driving factor amongst our members. When we survey our members—so when we talk to our members—employment security is a fundamental issue. It is no different from being an MP: every three years employment security becomes a key issue for you.

Mr BRENDAN O'CONNOR—And for union secretaries as well.

CHAIR—Do you have union coverage of those people who work for employers through labour hire and subcontracting arrangements?

Mr Cameron—It depends on what they are doing, but we have coverage of workers in the manufacturing industry generally.

CHAIR—So you certainly cannot say employers are doing it as a way of de-unionising their work force?

Mr Cameron—Certainly you could. You go back through the history of contracting out and you will see that the majority of disputes over contracting out have involved companies targeting the well-organised groups in the maintenance area, the opinion makers on the job and the leaders on the job, usually in the maintenance sector. They are targeted for contracting out.

CHAIR—But if I am outsourcing the entire maintenance function for an organisation—for example, the public transport sector—and I privatise all that, a fitter and turner or a tradie would still be a tradie. If they were a member of your union beforehand, they would still be a member afterwards.

Mr Cameron—Lots of these workers do not always end up coming straight back to the same workplace.

Mr BRENDAN O'CONNOR—The function could be outsourced with different employees.

Mr Cameron—Yes, the function could be outsourced and different workers could be brought in.

Mr Conroy—In our submission, we have detailed several case studies where union delegates and occupational health and safety representatives have been targeted for raising concerns and have actually been taken off the job because of that activity.

Mr HENRY—Yesterday we had the New South Wales branch of the TWU in, and they brought with them a number of witnesses who, by and large, were independent contractors who were members of that union. Does your union provide membership to people who are sole traders or independent contractors in that sense?

Mr Cameron—Our rules do not provide for coverage of independent contractors.

Mr HENRY—So you do not.

Mr Cameron—No. We would most likely have some members who are independent contractors, but our union is predominantly made up of employees.

Mr HENRY—It was interesting that yesterday the CFMEU also indicated that they had coverage—not necessarily in the industrial sense but membership of people who were subcontractors, independent contractors and sole traders.

Mr Cameron—There is a different industrial history for the TWU, the CEPU and the CFMEU in the areas where they work, where there has been a long history of coverage of independent contractors.

Ms HALL—When workers are made redundant in your industry, do they usually leave that work site, then a labour hire company picks them up and they come back, basically working on the same site the next day?

Mr Cameron—That does happen, and they usually come back on inferior terms and conditions.

Ms HALL—Can you give an estimation of the decline in apprenticeships within your union's area over the period of time in which there has been this proliferation of labour hire companies?

Mr Cameron—I can provide the committee with the figures regarding the decline in apprenticeships within the industry. No-one now would seriously question the decline in apprenticeships in the industry. There has been a massive shift of funding for apprenticeships out of the traditional trades to places like McDonald's and Kentucky Fried Chicken to do training in that area, to the detriment of the skilled trades in this country.

Ms HALL—It would be useful if we had that on record for the committee. Are qualified workers now being imported from overseas to meet this skills shortage?

Mr Cameron—We now have a new phenomenon appearing in Victoria, where we have one company that basically refuses to pay the going rate for its employees. It is one of the lowest paying companies in the country. They have imported Chinese welders. We have indicated to them that there are reputable skilled labour hire companies that could provide the workers to them, but they have declined that and the government has allowed it.

Mr BRENDAN O'CONNOR—Are you saying that even where there are no obvious signs of shortage they have been allowed to come in and work for a lesser rate?

Mr Cameron—When you look at this case in Victoria that was publicised, it was basically about that company not being prepared to pay the market rate. I have had lots of lectures about the market rates from some MPs on the other side of this table in the past. The market rate is there and we are now finding companies not even wanting to pay that, so they are going to China to import labour.

Mr HENRY—I would have thought they would have been fully occupied in China. In terms of that training, I noticed in your submission you used the UK example of outsourcing and the decline in company size as having an impact on training. Wouldn't it be fair to say that in the UK, at the same time as that was happening, there was a complete restructuring or destructuring of apprenticeship training that also led to a decline in apprenticeship training?

Mr Cameron—I am not totally familiar with the apprenticeship system in the UK. It is a long time since I was part of it. But the question of skilled trades is still as an important issue in the UK as it is here. There are still traditional trades there; there is still training for traditional trades. Scotland, where I come from, still has very strong trade based training.

Mr HENRY—They have come back to what we would call an orthodox apprenticeship training system. They had broken away from it.

Ms HALL—In comparison to overseas countries, how dependent is Australia on labour hire? You answered on the training issue to an extent in relation to the UK, but what about with OECD countries generally?

Mr Cameron—We have not done a comparison on that in our submission. However, if you look at some of the ILO stuff we have used, there is a problem internationally on this issue.

Ms HALL—Finally, with OH&S—I think that is an area of great concern when looking at labour hire and the responsibility for injured workers and getting them back to work—would you like to add anything extra on that to what you have in your submission? I know you have some great examples here.

CHAIR—There are four recommendations, Jill.

Ms HALL—I have the recommendations.

Mr Cameron—It is in the same context as the situation with the diminution of the tax base. This is a ploy by companies in our industry to transfer risk back to labour hire companies and then to individual workers. By transferring that risk, the cost of the workers compensation goes back to the individual or back to that labour hire company. That is why we are seeing an increase in the costs to the community generally by the use of labour hire and contracting. That is why we see this huge gap, or hole, in the tax base. I am surprised that no-one asked any questions about that, because it is a significant issue. If this committee does not deem it important enough to ask a question about it, I think it is interesting.

Mr BRENDAN O'CONNOR—We have not asked it yet.

CHAIR—We are not finished yet.

Mr Cameron—I thought you were winding them all up.

Ms HALL—Only me!

Mr BRENDAN O'CONNOR—You are winding us up now! I make the point that there has been a lot of evidence put that clearly says that tax revenue, both at state and federal levels, has been avoided or evaded as a result of the arrangements that have been established—you have a principal who wants to avoid payroll tax, you have an independent contractor who wants to avoid income tax, and that is a mutual arrangement. The Commonwealth and state governments lose money and therefore the public loses money. That has been said quite often, so it is good that you have reinforced that view, I suppose.

Mr Cameron—The NIEIR has done some calculations, which you can see in our submission, that quantify the amount.

Mr VASTA—We heard in evidence before, Mr Cameron, that this new generation, the Y generation, wants to have work in not just one area; they want to be flexible. These labour hire companies say they provide that flexibility. Do you agree with that theory? Does it happen in your industry? I know that it was not specifically about your industry.

Mr Cameron—It would be wrong for me to say that some workers do not look for some flexibility, but that is the minority of workers in our industry. The position of by far the majority of our members, from polling, focus groups and talking to them as organiser to member, is that they would like some security. They would like long service leave, sick leave and all of the provisions that come with a permanent job.

Mr VASTA—That was probably only for the younger people, but do you find that as workers get older they want that security?

Mr Cameron—There is no doubt about it. Security is an important issue. As you start to get responsibilities, generating income is important. In fact, we have got case studies in our submission that show workers who are desperate to get some security, desperate to get some collateral behind them. We have got a case study where one of our members sought to get a $5,000 loan and had to go through all sorts of hoops because he was not a permanent employee. He was a casual worker, a labour hire worker.

Mr VASTA—We just heard evidence to the contrary, that people who worked for this labour hire company can get home loans.

CHAIR—It was a recent development that took place between that particular labour hire company and one of the national banks. I am not sure how long it has been in operation, but they certainly indicated it was one of the new features that they are able to offer to their employees.

Mr Cameron—Isn't that fantastic?

Mr BRENDAN O'CONNOR—You can get a mortgage without a permanent job.

CHAIR—I am just saying what they said to us.

Mr Cameron—This makes my point rather than detracts from it. This makes my point on the basis that companies have to make special arrangements with the banks for their employees. It is a nonsense; it really should not have to happen.

Mr Conroy—If you look at some of the case studies of the people who want permanence, some of the labour hire companies are preventing them through bans on applying for permanent positions with their host employer or, as Doug said in his opening statement, with other labour hire companies. We have got examples of agreements that state that you cannot apply for that. Then there is the case study on page 26 which details an individual who worked for Buttercup as a labour hire for 11 years. He was only able to take six weeks leave in 11 years, all of it unpaid. He ended up being 64 years old with two dependent children and he never got made permanent on site.

Mr BAKER—I am intrigued because there have been so many conflicting submissions put forward. If you are an employer and you have got an employee from a labour hire company who is doing the job wonderfully well and you have got a long-term situation, why wouldn't you want to employ them on a permanent basis when you consider the extra money or the commission, the huge payment, you are making to that labour hire company? Why wouldn't you actually want to employ them?

Mr Cameron—I do not know where you get this huge payment that they are making. The labour hire industry is a pretty cutthroat industry and I am not sure—

Mr BAKER—We have heard up to 30 per cent.

Mr Cameron—I am sure you can find other companies that do not have a premium of 30 per cent. I do not think you should take one submission as being the general position in our industry.

Ms HALL—What is the general fee that is charged?

Mr BRENDAN O'CONNOR—It would be more in the range of seven per cent when you take away all the other labour on costs. I think the question Mark was raising was: what is the incentive for a host employer to actually enlist a labour hire employee if they are above and beyond paying them their wages, particularly—

Mr Cameron—But it is not.

Mr BRENDAN O'CONNOR—That is the point: it is not.

Mr Cameron—Australian Business Ltd have belled the cat. Australian Business Ltd's survey clearly indicates it is about costs. Regardless of the head line costs, when you look at the fact that they are not then responsible for a whole range of costs—a whole range of leave loadings and leave and other benefits to the employee—it is a cost-cutting exercise.

Mr BAKER—Doug, could you basically draw a line between skilled and unskilled workers as a more powerful bargaining perspective as far as what is paid above and beyond? If you are tradesperson, for example, you are not going to work in the current skills shortage for less than what you can get out there at the market rate.

Mr Cameron—And that is why companies are importing welders from China. But I think the situation is quite clear: most workers would prefer to be a permanent employee of the host company. There is absolutely no doubt about that. That is in survey after survey we have done. Our members continually tell us this. You have only got to look at our submission: permanency of employment is a really important issue for people, even MPs.

Mr BRENDAN O'CONNOR—To what extent is the outsourcing culture contributed to by managers wanting to abrogate their own responsibilities—the whole idea of saying, 'Let's effectively outsource my responsibilities'? While their salaries do not go down, their responsibilities seem to diminish. Can you reflect upon that?

Mr Cameron—Again, I will draw attention to our submission and the Business Council of Australia's short termism. We see this as part of that short-term approach, that myopic approach, to say, 'Let's cut costs as much as we can in the short term.'

Ms HALL—Have you conducted any survey of workers relating to the permanency of employment that you could submit to the committee?

CHAIR—You have referred to data a couple of times. Is that anecdotal data or is it a specific survey of your members?

Mr Cameron—We have actually done some surveys of our members.

Ms HALL—It would be really helpful if we could see that.

Mr Cameron—We will have a look at whether that is of any help in terms of specifics.

Ms HALL—That would be good.

Mr Conroy—Can I just quickly answer Mr Baker. A couple of questions back you asked about the margin. I think you will find that the margin with a lot of these companies is related to the labour hire people being paid the federal award, versus an enterprise agreement that is operating on site, or because of a state award versus the federal award. We have detailed in our submission how that happens. A company can pay a labour hire company the cost of the casual

worker, the casual loading and the margin to the labour hire company and still be under the site rate. I know you heard Manpower talk this morning about paying the enterprise agreement site rates. I think the experience of our industry is that that is a very rare phenomenon, if it occurs. The other incentive—when you are talking about why they would not make a skilled worker permanent—is the issue of transferring the risk so that the risk is borne by the worker.

Mr BRENDAN O'CONNOR—So there is a high prevalence of two employees doing the same job at the same site and getting different pay.

Mr Cameron—There is a very well reported case where our members in Victoria were concerned about their job security. They were in the host company and some self-employed contractors came on the job earning less than the workers on the job. The workers saw this as a threat to their employment security. I think they walked off the job for four hours. The ACCC then took a case against the union. The ACCC is not chasing up these labour hire companies who are saying to workers, 'You can't ply your trade,' but when the workers say, 'We want to get some employment security by stopping the undercutting by contractors,' the ACCC acts against the union.

CHAIR—Doug, you have made an assertion that the Australian taxpayer is potentially being short-changed $14.38 billion by some of these sham arrangements and by the way the definitions of subcontracting and labour hire organisations have been applied. We have very recently finished an inquiry into work force participation. There would be an argument that the major growth in the employment market in Australia for the last 10 or 15 years or perhaps even longer—Brendan would say it is in the casual work force, and there is certainly a lot of truth in that—has been due to the proliferation of labour hire companies and independent contractors. So are we really being short-changed as taxpayers? Aren't there swings and roundabouts in all this? We actually have more people in the work force as a result, and they are paying tax. I had to throw tax in there somewhere!

Mr Cameron—I am glad you are interested. I just cannot see the logic of that. If you look at the reality, these jobs are being created from permanent companies disaggregating their work force out. It is not as if there is some huge—

CHAIR—There is an element of that, sure. I understand that.

Mr Cameron—That is the main proliferation in our industry: major companies moving from a permanent work force to a work force of contractors and labour hire. It is not a net gain in jobs. In fact, the jobs that are then in place are lower paid, less secure and more casual. The conditions are worse. So it is not a great thing that this is happening, and I would have thought the government would be looking at a position to try and maximise security. Our members and workers in the industry would like to be a bit relaxed and comfortable. Remember that?

CHAIR—How did you come up with the figure of $14.38 billion?

Mr Cameron—We came up with that figure on the basis of the NIEIR analysis. The documents and information on where they get those arrangements are all appended to our submission. In my opening statement I took you to the main drivers of that figure.

CHAIR—You make a number of recommendations on occupational health and safety. That is a major area of concern for you and certainly it is a concern for us as well. We have also heard evidence from various witnesses that you cannot abrogate your responsibility for a safe workplace. So, even though you may be employing a labour hire company or subcontractors, as a host employer you are still responsible. Is it therefore simply an issue that the host employer is not accepting their legal responsibility? The law is there; it just needs to be acted upon.

Mr Cameron—The law is very weak in this area. There is still case law being established on this, but the law does not provide a lot of real teeth against an employer who abrogates their responsibilities on health and safety. There are minimal fines. It is not just the issue of an employer being fined; this is the issue of an employee going to work and being killed or maimed. That is the real issue here. Sure, we see an issue in employers being able to act in a negligent manner and be fined a minimum amount, but the main issue is that, if a worker gets a back injury, they carry that with them for the rest of their life.

CHAIR—I understand that, but why are we tackling that problem by saying it is due to the independent contracting and labour hire? Surely it is because we have not actually applied the law in the most stringent manner to the host employer.

Mr Cameron—I would ask you to look at our submission again and the case studies that we have done in relation to the problems that workers have trying to achieve a health and safety conscious workplace when working for a labour hire company. In our submission we have also identified some of the lack even of training that just gets them into the workplace to know what this is and what that is. In our submission, workers have identified that, unless they have the skills and knowledge—some of them pretend—they will not have a job next week. So they do not have the training on a specific site, they are brought onto the site and they try and do the job to the best of their ability, but they have not had proper training on the equipment on that site, so accidents proliferate.

CHAIR—I understand that, but my point would be that you can cover that deficiency without tackling the issue of labour hire and subcontracting, by saying that, as part of the contractual arrangement with the labour hire company, you must first of all accept your responsibility for occupational health and safety, rehabilitation of injured workers and pre-employment training.

Mr Cameron—We think you can do some of that, but you can only do it with a comprehensive regulation of the industry.

Ms HALL—Is it true that, because of the arrangement where you have a host employer and the labour hire company, it is slower and more confused and there are more areas for there to be problems in the worker accessing their rights under the workers compensation act?

Mr Cameron—There are always grey areas for workers. I think there have been some pretty high-profile examples of the issue you raise. I think it was at Garden Island dockyard where some Navy personnel were killed as a result of subcontractors—contract labour hire companies—going in and replacing hoses with the wrong hoses. Those hoses failed and I think a couple of young sailors were killed. There was a specific inquiry into that. I draw your attention to that and ask you to look at it as a committee and consider some of the conclusions that came out of that inquiry.

CHAIR—Doug and Pat, thank you very much for coming in today. Thank you for your very substantial submission and the amount of work that has gone into it. The appendix is obviously a very valuable resource to refer back to and to check out with other witnesses. If there is any other information you want to send to us, we would be most happy to receive it as well.

Mr Cameron—I am a bit confused about Minister Andrews's paper yesterday. I had quick look at it this morning.

CHAIR—We have not seen it; we have not read it yet.

Mr Cameron—I had a look at it and it canvasses the majority of the issues we have canvassed here this morning. I am wondering whether we need to make a fresh submission or a separate submission or whether this committee will be talking to the minister about getting some efficiency and flexibility between the government and this committee so that we are not—

CHAIR—Let me reassure you that, in the next couple of days, I will be talking to the minister to ascertain from him his time frame for a legislative response versus our time frame for reporting. Hopefully our reporting will be before he decides to go into parliament with the legislation.

Mr BRENDAN O'CONNOR—Obviously, Phil has his position as position of chair and he is a member of the government. Other committee members are concerned that the minister has referred the matter to us and has then pre-empted and in some ways prejudiced the process of the committee. As I see it, that was an unfortunate assault by the executive on the parliament. I hope that we can continue on and add value to the debate, because it is a very significant issue.

Ms HALL—It has certainly undermined the workings of the committee.

CHAIR—I am not sure that is the case, actually, Brendan.

Mr BRENDAN O'CONNOR—I wanted to put it on the record.

CHAIR—But it was pretty well known out there prior to us getting the inquiry that there would be a discussion paper released. There were a number of potential witnesses who contacted me and the secretariat, saying, 'Do we need to make a submission to your inquiry, considering the minister is about to release a discussion paper?' That was before we even advertised. Thanks, Doug.

[3.29 p.m.]

HOULIHAN, Mr Daniel, Industrial Relations Adviser, IR Australia Pty Ltd

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that these hearings are formal proceedings of the parliament and consequently warrant the same respect as proceedings of the House itself. It is customary to remind witnesses that giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers to hear evidence in public, but if you have issues that you would like to raise in private we will consider your request. Would you like to make an opening statement?

Mr Houlihan—Firstly, I would like to thank the committee for this opportunity. IR Australia is a Sydney based industrial relations consultancy. We have had wide experience in representing a number of labour hire companies throughout Australia, including National Grazing Services, Inland Recruitment and Training, Select, Manpower, and a variety of other such companies. We have been involved in the development of a number of industrial instruments for those companies, giving advice on strategic industrial relations and how they approach organised labour and unorganised labour, and their obligations under various site agreements across the country. We hold ourselves as being somewhat expert in the area of industrial regulation, particularly with reference to labour hire.

Our major concern with any amendments to industrial regulation—that is where most of our focus lies—is to ensure that the relevant industrial relations act, in this case, the Workplace Relations Act, covers employment issues only. It is of some concern to see the deeming provisions in other jurisdictions that widen the breadth of the employment relationship. We make three recommendations in our submission. Firstly, that the definition of 'employer' and 'employee' should remain as the common law definition. As attached to the minister's discussion paper—which I have just realised you guys probably have not read—

CHAIR—We have seen it.

Mr Houlihan—it is a well-established way of determining whether or not there is an employment relationship or whether or not there is an independent contract relationship—whether contract of service or contract for service. We believe that the Workplace Relations Act or any successor legislation should regulate only employment and that other areas concerning independent contractors should be excised, whether that is 127A, 127B and 127C, and that that should be the core goal. Independent contractors can be regulated under other heads of power, whether it is through the corporations power, the Trade Practices Act or the proposed independent contractors act.

With respect to AWAs, certified agreements and other types of agreements that the act allows for, it has become more and more apparent, particularly in the last couple of weeks following the High Court's decision on Electrolux and the decision handed down on 18 March by the full bench of the Australian Industrial Relations Commission, that there is a potential problem in AWAs and certified agreements applying to other organisations that are not parties to these

contracts. We think that that is a very dangerous and grey area. It removes the surety that people are entitled to when they enter into such contracts. It is particularly important with respect to labour hire companies, which are just a form of independent contractor themselves, that in a contract entered into between company A and its employees—and if there is a requirement for excess employees, whether it is a short-term requirement or a long-term requirement—the industrial regulation that is prevalent between the labour hire company and its employees should take precedence over any other sort of industrial regulation that is on the site. For example, if the labour hire company has terms and conditions that are in excess of the site agreements, then obviously the labour hire company conditions would apply. I do not think you will hear any submissions from any union movement or any other party that suggests otherwise. But if the company has in place an award or a certified agreement that explicitly covers that type of work, then that agreement should really prevail. If the labour hire company and the employees choose to make an overaward payment or an overagreement payment, that is something that they can come to between themselves rather than providing for third party industrial regulation to apply to a different party.

CHAIR—You would have found Mr Cameron's comments interesting then?

Mr Houlihan—Mr Cameron's comments need to be seen in the context that they were given. I do not have a problem with increased jobs at McDonald's or KFC—they are real jobs; they are people performing real labour for real wages. It is not my problem if the union movement has found it difficult to organise in such areas and that it feels that these jobs are not properly and adequately remunerated. The availability is there, the awards are there and the laws are there to protect them. If unions find it difficult to organise, that is their problem.

It is the same with labour hire companies. Those companies are generally well known if they are employing large groups of people. Unions have the same rights of entry to labour hire companies as they have to host or site employers. It is up to the union movement, if they have a problem, to get out there and organise rather than being reliant on old membership models that relied on an employer organising for the union movement.

Going back to my point: in relation to third party agreements applying to a different employer-employee relationship, that raises interesting issues with regard to transmission of business provisions currently contained in the act. We see that as being another problematic area that goes squarely to the terms of reference of this committee in terms of ways of securing independent contracting, and we see labour hire as being just another form of independent contracting. There is still a contract of employment between employees and the labour hire company.

The transmission of business requirements needs to give primacy to the employer-employee relationship, not to the site terms and conditions. It is quite possible that there is a decision of the Industrial Relations Commission or the Federal Court concerning the Simplot site at Ulverstone involving Manpower, who I notice appeared before you today. Even though Manpower had a relevant agreement in place, the terms and conditions of the Ulverstone site were transmitted to Manpower. It is a difficult issue and it is an interesting issue. It removes certainty from labour hire companies.

We make the point in our submission that one of the benefits of using labour hire is that it increases the mobility of labour throughout the Australian economy. I do not dispute that there

are some people who prefer to have a permanent job on a permanent site, in the same way that Mr Cameron did not dispute that there would be some people who would prefer to go to a variety of workplaces to work under a variety of different conditions and gain a variety of skills. We see labour hire as being an important conduit, particularly in times of skills shortages, for the movement of skilled labour from areas that need it to areas that are not so important or vice versa.

That just about concludes my opening submissions with regard to industrial relations. I note some of the questions from the committee to Mr Cameron regarding occupational health and safety. It is a well-established legal principle that an employer, and a person who is acting in the same role as an employer, has a non-delegable duty of care. That is, they cannot just contract out their obligations under various occupational health and safety schemes simply by engaging labour hire or independent contractors. They have a real obligation, as an employer, to protect not just their employees but people who use their work site as well. No amount of contracting out can remove that obligation.

In terms of workers compensation, I was interested to read the submission of the Insurance Council of Australia, which referred to the issue of independent contractors falling outside the net of workers compensation schemes around the country. They make the point that these independent contractors are suing the site, the host employer or the host contractor for the damages that they receive and that this is undermining the workers compensation tribunals and the workers compensation schemes. We note the comments of the Australian Insurance Council that people will be motivated to act for the best outcome that they can receive. We do not see that as being a degradation of the workers compensation schemes. We do not see that there is a danger of degrading the benefits to employees or the protection to employees under occupational health and safety schemes or workers compensation schemes. So long as the relevant host employer is acting in the role of an employer, they still maintain a liability to the people who are working on their premises.

We think it is a little bit of a furphy to say that there are rogue employers or poor occupational health and safety labour hire companies. The law is there. There is an inspector in each of the states. The unions have powers under state acts and federal acts to enforce the laws. It does not matter who the employer is and it does not matter where the site is, the laws are there to protect them and they are in place. We see it as a little bit of a furphy. We think the most important thing to bring security to independent contracting and the labour hire industry is to have a single definition. It is not often that our consultancy is in agreement with the AMWU, but we believe that to have a single definition about what an employer is and what an employee is across workers compensation, occupational health and safety, taxation, superannuation and industrial regulation will clear up a lot of the grey areas, and a lot of the sham arrangements that we keep hearing about would become so much more transparent.

In my submission, I refer to Vabu, where a single organisation had different requirements under the five different tests—treating them as employees for the purposes of tortious liability and award obligations, and treating them as independent contractors for taxation and superannuation. It has been determined by the High Court, or the Supreme Court in New South Wales, that is very difficult for a single company to operate under such a scheme. It will lead to increased inadvertent breaches of legislation. We believe the best way to clear that up is to just reinstate across the whole sphere—taxation, superannuation and workers compensation—the

common law definition of 'contract of employment' and 'contract for service'. That concludes my opening submission.

CHAIR—Thank you very much, Mr Houlihan. If you have any general comments that you want to share with us, based on what you heard from the previous witnesses, I would certainly welcome that as well. The sense I am getting is that the critics of any further growth in independent contracting in labour hire companies are resorting to the issue of occupational health and safety as a way of saying, 'This is why we don't want this to happen.' That is the point I was trying to make to Mr Cameron regarding not abrogating responsibility for it. Also, the Lawyers Alliance referred to the fact that organisations are doing this as a way of reducing their premiums. How do we counter that kind of criticism to anything that we may be proposing so that we can entrench the responsibilities of the host employer on safety?

Mr Houlihan—The host employer already has an obligation for safety. If the host employer's work site is unsafe, I think that is a separate issue to workers compensation premiums. Workers compensation premiums should rightly be levelled on the employers. Whether it is Manpower, National Grazing Services or 'Joe Bloggs Employment Agency', if the employer has a satisfactory safety record and they are operating in a variety of industries then I can think of only two ways for the workers compensation schemes to account for that: there needs to be either a new definition or a new industry of labour hire. Whether or not that is set at the top premium until some point further down the track, over a length of time, the labour hire industry will establish a practice that it is a safe employer or an unsafe employer. I have not heard or seen any evidence lead as to the prevalence of workplace injuries under labour hire arrangements or independent contractor arrangements as opposed to direct employment relationships, so I simply cannot comment on that aspect.

CHAIR—Yesterday afternoon and today the unions told us that workplaces are rife with breaches of occupational health and safety by independent contractors and labour hire companies. To give you an example from yesterday, in the mining sector a subcontractor is paid on an hourly rate versus the permanent rate. As soon as it rains the permanent guy would stop driving and the subcontractor would keep driving, otherwise they would be sent home and they would not get paid.

Mr Houlihan—The unions already have the power to close that site if it is deemed to be an imminent danger, even under the federal act. I could have an argument with you about the role of the union in occupational health and safety, but the powers are already there. It is a longstanding principle that parliament does not simply increase a legislative regime because powers are not being used. There is ample scope for the union movement to move towards that. If an independent contractor signs a contract of service with the prime contractor that they will continue working in the rain, and that independent contractor is a genuine independent contractor, it is up to the independent contractor to make the decision.

CHAIR—So what you are saying is that there is no further legislative change that needs to take place; it is already there enshrined in legislation. How about through contractual arrangements? Should we be making it clear that the contractual arrangements should spell out the responsibilities very clearly to both parties?

Mr Houlihan—When you enter into a contract the contractual arrangements should be very clear. Contracts are organic; they change over time. Things are implied in them about further dates, and you accept further duties and further responsibilities if the contract is ongoing. I am not saying there should not be any legislative change. I am saying that the change should be directed squarely to enshrining a single definition across the employment relations field, whether it is in taxation or superannuation. We feel that is important. But in terms of shoring up regulation of labour hire companies, those companies are employers; there is no sham about independent contracting. There is a contract for service between the host and the labour hire company and a contract of service between the labour hire company and its employees.

CHAIR—You seem to have a high level of confidence that labour hire companies are all okay and very kosher in terms of how they are operating.

Mr Houlihan—I was talking about the people in the labour hire companies I represent.

CHAIR—What about some of the smaller players? Do you have any concerns you want to share with us or things that we should be aware of?

Mr Houlihan—No more than you would have concern you would have about the small corner shop operator who opens up and underpays on the award or does not provide a safe working environment. I do not distinguish between a small labour hire company and a small employer. They have exactly the same problems. There are problems of scale and of the smaller employer not having access to information and not having the financial wherewithal to get proper advice.

CHAIR—I have one more question and then I will hand over to some of my colleagues. The Trade Practices Act has been thrown at us a number of times as one of the inhibitors preventing subcontractors—putting aside labour hire companies now—from getting together in order to maximise their negotiating power with suppliers, or whoever they may be. Would you advocate a change in the trade practices laws to allow subcontractors to be able to do this?

Mr Houlihan—I understand that is proposed in some way. I would. I have had a fair few dealings with the TWU over the last 10 years. I think you have heard from the state secretary about the role of the TWU in New South Wales with regards to the issues of bailment and owner drivers, in particular. For those types of industries it is very easy. There are very low barriers of entry into the market so it is almost naturally a free market. The TWU—or any other organisation—when it is acting in that sort of role, does not differ from the Australian Industry Group acting on behalf of a heap of employers in a safety net decision. We have to consider whether or not an association of independent contractors needs to be able to form together and receive the same sorts of protections as a trade union does under the Trade Practices Act—the exemptions they receive.

CHAIR—We even heard the same thing this morning from the interpreters and translators. The interpreters and translators are powerless and if they try to get together in order to maximise some negotiations they are not allowed to do it.

Mr Houlihan—They are not allowed to do that at the moment, no.

Mr HENRY—You heard the evidence provided by the AMWU, and just then, in some of your opening remarks, you made comments about fast food services as part of the changing attitudes to eating out, as well as the casualisation of employment. Would you relate that also to the way people see the labour market and employment relationships with respect to labour hire—that there is a changing approach to employment because of changing economic factors and changing attitudes, that we are actually into a period of change and that perhaps the arguments being put by the AMWU and others are more about protecting their patch?

Mr Houlihan—I would agree with those comments. The AMWU has a very real concern about its membership, because that is what keeps the AMWU executive in a job. So they have a real interest in security of employment. I think the continuing decline of people joining organised labour is a real worry for the union movement, and I think they will look for issues that support their current base. The union movement has manifestly failed to organise in new areas of employment. They have manifestly failed to organise in alternative employment situations, whether it is casuals or the growth of part-timers. They have had very much an ostrich mentality. They do not want to see it; they do not like it so they stick their heads in the sand, and they are now reaping the benefits of that attitude. The fact that we are entering our 15th continuous year of economic growth and are running up against capacity restraints speaks about the need of continuing the process that we started under the Keating government in freeing up the labour markets. Our labour markets, I would argue, are not free enough. I would argue that the increase in the labour hire industry is a real and valid response to the shifting of skilled labour to areas where it is needed most. You do not hear anybody arguing that we should return to the days of master and servant relations and that you can only enter into a contract of employment on a single day of the year, which is the ultimate in job security if we want to wind the clock all the way back. We just want to wind the clock back a little bit to protect our vested interests.

Mr HENRY—Extending that a little further, national consistency, as far as your approach to defining employer, employee and independent contractor is concerned, would be an important aspect of what you are proposing.

Mr Houlihan—Absolutely. We have a preference that the common law definition should prevail, but what we think is even more important is that there is a common definition. The ATO's personal services test is perhaps not the best definition but, if it is consistent, it is consistent. People want to know. You remove sham independent contracting arrangements and long-term permanent casualisation of the work force and those sorts of things by having proper and consistent definitions. If you know where you stand, you are in a much stronger negotiating position.

Mr HENRY—You have raised transmission of business in your submission, but I do not quite get the picture there of how it is relevant to this exercise. Is that where an employee may change from direct employment with a company and transfer to a labour hire company, and where there is a transmission of benefits?

Mr Houlihan—We would say that there are a couple of scenarios. We say there are really two sorts of labour hire companies. We say there is an internal labour hire company similar to what Patrick's did prior to the maritime dispute in setting up Patrick Nos 1, 2, 3 and 4 and Patrick Stevedores, Tasmania. That is where the employees were engaged. But there was another

company that held the capital and there is a labour hire relationship. There is no sham contract. It is proper and on foot. In those instances there is clearly no transmission of business, because the employment is continuous and ongoing.

In cases where a company makes the decision that they do not want to be in the business of employing anybody and they contract with an outside labour hire company, the labour hire company's part of the contract picks up those employees and that labour hire company is now the employer. There is continuous and ongoing employment, even if that employee chooses to move from Sydney to Perth to Adelaide and even if they were a fruit picker under one part and a house painter under another. There is a problem with the transmission of business in that, if they go onto a different site, the site agreements can transfer onto that employment relationship.

Mr HENRY—This was decided in Gribbles and Amcor.

Mr Houlihan—The Gribbles and Amcor decisions are important decisions, but they do not really clear the air. Gribbles, in particular, assisted in some way by looking at whether or not there has been a transference of an asset, whether it is tangible or intangible. That is important, but that is only about a succession. The Federal Court and the High Court are full of decisions that say business is a very difficult term to understand, and that is manifestly true. The Industrial Relations Commission, when they handed down the termination change and redundancy case in 1984, had the same problems. It was the same again when they handed down the revised decision, the redundancy decision, last year.

Transmission of business is covered under four different areas in the Workplace Relations Act, all with slightly different interpretations. That is another area that we think needs to be looked at. We flag it as a concern for labour hire companies and for independent contractors, in that it removes the surety of their contract with their employees that an outside party can come in and impose different conditions to the conditions that have been agreed. That is where we see the issue that needs to be clarified.

Mr BAKER—A lot of this has been said before. If we listened to and agreed with some of the submissions of Doug Cameron and the unions, basically labour hire companies are coming from Third World countries and absolutely dissipating our economy, workers rights et cetera. If we have a national licensing regime put in place with audits on the labour hire companies who are major players, surely any that are doing the wrong thing would dissipate and fall by the wayside.

Mr Houlihan—I would argue that that is not even necessary. If there is a company that is importing labour from China as welders because they simply want to subvert the terms and conditions under the award or under the industrial regulation, DIMIA would have plenty to say about that. You are assuming it is either a sponsorship arrangement or these guys are being paid outside of the industrial regulations scheme, outside of the terms of their visa. I do not really see that as a relevant consideration. The unions have the power to inform DIMIA, and DIMIA certainly have the power to prosecute the company already. Having another regulatory body to overlook labour hire is not necessary. Would you include internal labour hire arrangements, similar to what happened with Patrick's or with Amcor? It is a very difficult thing. Why would this one sector of employment require extra regulation overseeing it, when there are already industrial regulation and workers compensation and occupational health and safety regulations in place that regulate general employment conditions? To suggest that labour hire is a different

beast is to overlook the fact that it is simply a mechanism of employing labour and shifting skills to where they are most needed.

Mr BAKER—You are saying that all the regulatory bodies are already in place.

Mr Houlihan—It is already there. The courts are already clear about what a contract of service is and what a contract for service is. Most people with a little background either in the law or in industrial relations can reasonably easily distinguish between the two. It is not a particularly grey area in that aspect. The greyness comes where there are different definitions across different areas of employment regulation.

CHAIR—Thank you very much. We have run out of time. I would have liked to ask some questions about training, but certainly your perspective is a nice counterbalance to what we have been hearing over the last couple of days. We appreciate your submission and the time you have given us. If there is any other information you want to share with us, please send it through.

Resolved (on motion by **Mr Baker,** seconded by **Mr Henry**):

That this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 4.00 p.m.